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No. 83-

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In The
Supreme Court of the United States
October Term, 1983

VOLKSWAGEN OF AMERICA, INC.,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (JOAN NOSSE, et al Individually and on Behalf of All Others Similarly Situated, Real Parties in Interest)

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Does Section 1781(d) of the California Civil Code violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States when applied to require notice of the pendency of a class action by publication only, even to members of a class of plaintiffs whose names and addresses can be ascertained with reasonable effort?

Does Section 1781(d) of the California Civil Code violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States when applied to require a defendant opposing a class to pay substantial costs of notice to the class prior to any determination of liability and without hope of reimbursement if defendant prevails or if class certification is limited or rescinded?

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Pursuant to Rules 15.1 and 28.1, appellant states that real parties in interest (hereinafter "appellees") not named in the caption of this action in this Court are plaintiffs Jerry Kane, Gwen Wong, Yao Tao Fang and Katherine T. Fang, and Cliff Hoffmann, appellant's parent corporation is Volkswagenwerk Aktiengesellschaft, a German corporation, and appellant has no corporate subsidiaries or affiliates other than wholly owned subsidiaries or corporations formed to promote a joint venture between appellant and another separate and independent corporation.

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No. 83-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

VOLKSWAGEN OF AMERICA, INC.,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO
(JOAN NOSSE, et al Individually and on Behalf of All
Others Similarly Situated, Real Parties in Interest)

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT

Volkswagen of America, Inc., the appellant, hereby appeals from a final order of the Supreme Court of California, dated February 1, 1984. The order appealed from denied appellant a hearing on its challenge to section 1781(d) of the California Civil Code as repugnant to the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The order thus upheld that statute as constitutionally valid when applied to require that notice of the pendency of a class action be given by publication only, even to thousands of class members whose names and addresses are available with reasonable effort, and to impose substantial notice costs on a defendant opposed to the class, prior

to any determination of its liability to the class and without any prospect that such costs may later be recovered.

OPINIONS BELOW

The order appealed from (appended hereto at page 1a, *infra*) is reported in the California Official Reports, 1984, Number 7, at page 28. The order of the Superior Court of the State of California, County of San Francisco, dated September 6, 1983, prescribing the challenged notice procedure and allocation of costs (3a-4a), and the order of the Court of Appeal of the State of California, First Appellate District, dated November 23, 1983, denying intermediate appellate review of the trial court's order (2a), are unreported.

JURISDICTION

This appeal seeks review of trial and appellate court orders which, in accordance with §1781(d) of the California Civil Code, (1) require notice by publication only in a class action, even where tens of thousands of members of the class may be identified from computerized lists maintained by appellant, and (2) impose substantial notice costs on a defendant opposing the class, prior to any determination on the merits, and without any showing that the named plaintiffs can reimburse such costs if they do not prevail on the merits or if class certification is later rescinded.

The order of the Supreme Court of the State of California denying appellant a hearing on its constitutional challenges was filed on February 1, 1984 (1a). Notice of Appeal submitted to the Court of Appeal of the State of California, was duly filed on February 10, 1984 (15a-16a). Notice of Appeal tendered to the California Supreme Court on March 28, 1984

(11a-12a), has been acknowledged as "Received" as of April 10, 1984 (13a).[1]

This appeal is being docketed in this Court within ninety days from the denial of hearing below. Jurisdiction is conferred on this Court by 28 U.S.C. §1257(2). *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481-482 (1975); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171-172 (1974); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 557-558 (1963); *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). In the alternative, jurisdiction is invoked under the provisions of 28 U.S.C. §2103.

CONSTITUTIONAL PROVISIONS AND STATUTE

Fifth Amendment, United States Constitution

> "... nor shall any person ... be deprived of life, liberty, or property without due process of law...."

Fourteenth Amendment, United States Constitution

> "... [n]or shall any State deprive any person of life, liberty or property without due process of law...."

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1. Notice of Appeal was first submitted to the California Supreme Court on or about February 10, 1984. However, such notice was rejected at that time, apparently due to the fact that the record remains lodged below in the Court of Appeal (11a).

Section 1781(d), California Civil Code

"If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action. The party required to serve notice may, with the consent of the court, if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication . . ."

STATEMENT OF THE CASE

This is a class action brought under California law on behalf of certain current and former owners of 1974-1979 model year automobiles distributed by appellant. Appellees, plaintiffs below, allege that valve stem seals (internal engine parts) in such vehicles were defective, leading to a spectrum of possible mechanical problems among individual class vehicles (6a).

As certified, this action seeks recovery for the cost to individual class members of any "excessive" oil consumption and related repair caused by the allegedly defective parts, and other incidental and consequential damages, which "will vary with the facts of each case" from "nominal" to the cost of a "replaced engine." (7a) The size of the class is estimated at 200,000 persons. (6a)

The individual identities of a substantial proportion of the certified class cannot be established. However, the names and addresses of as many as 50,000 or more class members are ascertainable from appellant's computerized "Vehicle Data File." (83a; 81a-84a, *passim*)

There has been no determination on the merits in this case. In the words of the class notification ordered by the trial court, "THE COURT'S ORDER THAT THIS ACTION MAY PROCEED AS A CLASS ACTION IS NOT A DETERMINATION OF THE MERITS OF ANY OF THE CLAIMS ASSERTED BY THE PLAINTIFFS. . . . This notice is not to be understood as an expression of any opinion by the court as to the merits of any claims or defenses . . . in this litigation." (8a, par. 5 (emphasis in original.)) In addition, the record contains no showing whatever that appellees can defray or reimburse appellant for the costs of notice.[2]

Nevertheless, the trial court required notice by publication only, in conformity to the criteria of Section 1781(d), California Civil Code. The trial court further ordered appellant to "advance" 75% of the cost of the notice ordered (3a).[3] No security for such costs has been required, despite appellant's arguments that such security was necessary in order to avoid a permanent deprivation of its constitutionally protected property. Appellant's share of such costs is at least $23,000. (19a)

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2. Representations of counsel and supporting affidavits of appellees categorically asserting appellees' inability or unwillingness to defray any substantial notice costs were stricken by the trial judge when deposition testimony on these matters was refused by appellees (31a-33a, *passim*).

3. The trial court's order also purports to extend to appellant "the right, *at its sole expense,* to cause additional notice to be given by publication or direct mail." (4a) (Emphasis added).

Raising The Federal Questions

The constitutional questions presented on this appeal have been explicitly raised and thoroughly argued at every stage of the relevant proceedings below.[4]

At the outset of proceedings before the trial court on class notice, appellees urged that publication notice, or no notice at all, be given, and that all costs be imposed upon appellant, in explicit reliance on California authority construing and applying Section 1781(d) of the California Civil Code (86a-93a). Appellant opposed such notification procedures and cost allocation on the constitutional grounds urged on this appeal (68a-80a). Following entry of the trial court's September 6, 1983 class notification order, appellant sought a writ of mandate from the Court of Appeal to review the unconstitutional aspects of the lower court order. The questions now before this Court were argued once more by both sides (29a-57a). The Court of Appeal denied appellant's petition on November 23, 1983, and appellant petitioned for review in the Supreme Court of California, urging that "to the extent section 1781(d) of the California Civil Code authorizes the order below, the section contravenes the due process clauses of the Federal and California Constitutions". (17a-18a; 26a) The February 1, 1984 denial of hearing by the California Supreme Court from which this appeal is taken thus explicitly considered and rejected the precise federal constitutional positions urged on this appeal.

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4. Portions of both parties' submissions below addressed to the issues raised on this appeal are reprinted at pp. 17a-99a *infra*.

THE QUESTIONS ARE SUBSTANTIAL

The Need for Guidance from This Court

In Eisen v. Carlisle & Jacquelin, supra (hereinafter *"Eisen IV"*), this Court definitively addressed the issues presented on this appeal, with respect to federal courts applying Rule 23(c), Fed. R. Civ. P. Despite the obvious constitutional implications of that decision, this Court had no occasion to rule on the relevant due process issues directly. These questions, accordingly, continue to be unresolved and the topic of extensive discussion and debate.[5]

Courts and commentators have long recognized that class action notification and the allocation of

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5. Prior to this Court's decision in *Eisen IV, supra*, this discussion was well under way, both in the federal courts, *e.g., Greenfield v. Villages Industries Inc.*, 483 F.2d 824, 831-832 (3rd Cir. 1973); *Eisen v. Carlisle & Jacquelin ["Eisen III"]*, 479 F.2d 1005 (2d Cir. 1973), vacated and remanded, *Eisen IV, supra; Eisen v. Carlisle & Jacquelin ["Eisen II"]*, 391 F.2d 555 (2d Cir. 1968); *Contract Buyer's League v. F&F Investment*, 48 F.R.D. 7 (N.D. Ill. 1969); *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969); *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D.Pa. 1968); *Eisen v. Carlisle & Jacquelin ["Eisen I"]*, 41 F.R.D. 147 (S.D.N.Y. 1966), and among commentators. *E.g.*, Fisch, *Notice, Costs and the Effect of Judgment in Missouri's New Common-Question Class Action*, 30 Mo. L. Rev. 173 (1973); Homburger, *State Class Actions and the Federal Rule*, 71 Col. L. Rev. 609 (1971); Maraist & Sharp, *Federal Procedure's Troubled Marriage: Due Process and the Class Action*, 49 Tex. L. Rev. 1 (1970); Recent Development, *Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs by Defendant in Class Actions Rejected*, 73 Col. L. Rev. 1641 (1973); Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 Md. L. Rev. 139 (1969).

related costs raise due process questions.[6] The nature and content of the applicable requirements continue to stimulate lively interest.[7]

In addition to their doctrinal significance, the issues raised on this appeal are of nationwide practical importance. Forty-eight states and possessions, and the District of Columbia, have established class action procedures.[8] As to the matters in issue here, these procedures vary widely. A majority have adopted *ver-*

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6. *E.g., Eisen III, supra,* at 1009, n. 5, 1013, 1020 (Hays, J., concurring); *Berland v. Mack, supra,* at 131-132; *Cartt v. Superior Court,* 50 Cal. App. 3rd 960, 975 (1975). Amendments to Rules of Civil Procedure, Advisory Committee's Note, Rule 23, Fed. R. Civ. P., 39 F.R.D. 69, 98 (1966); McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues,* 25 Hast. L.J. 1351, 1398-1399 (1974); Comment, *Cost Allocation in California Class Actions,* 13 Cal. W.L.Rev. 65, 80-81 (1976); Note, *Allocation of Identification Costs in Class Actions—Sanders v. Levy,* 91 Harv. L. Rev. 703, 711 at n. 60 (1978).

7. *E.g.,* Bennet, *Eisen v. Carlisle & Jacquelin: Supreme Court Calls for Revamping of Class Action Strategy,* 1974 Wis. L. Rev. 801; Smith, *Class Action: State Notification Requirements After Eisen,* 8 West. St. U.L.Rev. 1 (1980); Note, *Allocation of Initial Notice Cost Under Federal Rule 23(c)(2),* 1973 U. Ill. L.F. 723; Note, *Civil Procedure—Class Action—Amending Rule 23 in Response to Eisen v. Carlisle & Jacquelin,* 53 N.C. L. Rev. 409 (1974). *See generally,* Newburg, *Class Actions,* §§2350, 2375 (1977 Ed.), *passim.*

8. Citations to relevant provisions are appended as Appendix M at pp. 100a-101a, *infra.*

batim the language of Rule 23, Fed. R. Civ. P.[9] The remaining jurisdictions have chosen from seventeen different statutory or rule formulations.[10] In a number of states, significant recent enactments or revisions have taken place in obvious and often explicit reaction to this Court's decision in *Eisen IV*.[11] The resulting necessity for guidance from this Court is manifest.

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9. Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Guam, Hawaii, Idaho, Indiana, Kentucky, Maine, Minnesota, Missouri, Montana, Nevada, Ohio, South Dakota, Tennessee, Texas, Utah, Virgin Islands, Vermont, Washington, Wyoming. *Ibid. Eisen IV*, however, is not necessarily controlling even in such jurisdictions, which are not bound by this Court's constructions of such language, except as to constitutional matters. *E.g., First Baptist Church v. Citronelle-Mobile Gatherine, Inc.*, 409 So. 2d 727 (Ala. 1981).

10. Arkansas, California, Florida, Illinois, Kansas, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania and Rhode Island have adopted unique statutes or rules. Georgia, Louisiana, Michigan, North Carolina, Puerto Rico and West Virginia have adopted the language of the 1938 version of Rule 23, Fed. R. Civ. P. Nebraska, South Carolina, and Wisconsin have adopted provisions derived from the New York "Field Code" of 1849. Iowa and North Dakota have adopted the Uniform Class Action Act.

11. Post-*Eisen IV*, Florida, Iowa, Maine, North Dakota, Oklahoma, Oregon and Texas have adopted legislation or rules consistent with the doctrine of that decision. Arkansas, the District of Columbia, Illinois, New Mexico, New York and Pennsylvania have rejected the *Eisen* approach as to notice, cost allocation or both matters.

Perhaps no state has sought as eagerly to distance itself from the requirements of *Eisen IV* as California. Among the leading authorities in this area is *Civil Service Employees Insurance Co. v. Superior Court*, 22 Cal. 3rd 362 (1978), which was a focal point of argument below. (*E.g., 34a-39a; 58a-61a; 73a-75a; 91a-93a*) *In Civil Service, supra*, the California Supreme Court, divided 4-3, upheld the imposition of notice costs on a class action defendant under section 1781(d) against a federal due process challenge. Over a vigorous dissent, the majority stated in *dictum* that such an expenditure could constitutionally be ordered even without a determination on the merits or any assurance of repayment. *Id.* at 375-378; 382-387 (dissent). The order before the Court on this appeal upholds actions fully in accordance with this view. The issues on this appeal thus come before this Court both briefed by the parties and energetically debated by the highest court of the relevant state.

The Deprivations of Due Process Are Clear

The constitutional inadequacy of the notice ordered below, as to the 50,000 or more class members who are "identifiable through reasonable effort," *Eisen IV, supra*, at 175, is beyond argument. "Notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable . . . " *Schroeder v. City of New York*, 371 U.S. 208, 212-213 (1962); *Mullane v. Central Hanover*

Bank & Trust Co., 339 U.S. 306, 315 (1950).[12] Class actions confer no exemption from this requirement. "[N]otice . . . is the touchstone of due process in a class action." *Eisen IV* at 176. Accordingly, as to tens of thousands of class members, some of whose individual claims may exceed $1,000 (24a), the "notice" ordered below is, in due process terms, no notice at all.

The cost allocation ordered below is equally infirm. Even minimal and temporary interference with property prior to a determination on the merits must result from hearing and determination "appropriate to the length or finality of the deprivation." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). *See, North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). A permanent and final deprivation should therefore require, at a minimum, a determination guaranteeing a plaintiff at least some success on the merits in order to provide the required balance between the nature of the deprivation and the "process" appropriate to support it. *See, Paratt v. Taylor*, 451 U.S. 527, 540 (1981); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The payment of at least $23,000 by appellant ordered below cannot possibly meet the constitutional standards. The deprivation of appellant's property at

12. Even as to the more than 100,000 plaintiffs who cannot be identified, such notice is subject to significant questions, in view of the substantial nature of many categories of potential individual claims.

issue is substantial in amount, *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340 (1978), and permanent in nature. P. 5, n. 2, , *supra*.[13] However, nothing approaching a determination appropriate to the nature of this deprivation has occurred. The Court has not in any way determined liability and has expressly disclaimed "an expression of any opinion . . . as to the merits of any claims or defenses . . . in this litigation." P. 5, *supra*. Even the class certification order, as in federal practice, is conditional and subject to revision. *Vasquez v. Superior Court*, 4 Cal. 3rd 800, 821 (1971); *accord, Dolgow v. Anderson*, 53 F.R.D. 664 (E.D.N.Y. 1971), aff'd. 464 F.2d 437 (2d Cir. 1972). Such preliminary and indeed non-existent "process" cannot constitutionally support the final and permanent deprivation ordered below.

On the bare facts of this case, the due process violations at issue are so plain and fundamental that summary reversal would be entirely appropriate. However, as demonstrated above, the nationwide importance of the questions presented and the thoroughness with which they have been addressed militate in favor of plenary consideration of this appeal.

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13. Indeed, as to the additional costs which appellant has been given the "right" to bear, "at its sole expense," p. 5, n. 3, *supra*, the deprivation on its face is absolute. *See, Oppenheimer Fund Inc. v. Sanders, supra*, at 361, no. 30.

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction of this appeal. In the alternative, review should be granted under 28 U.S.C. §2301.

Respectfully submitted,

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Of Counsel

May 1984

APPENDIX A

ORDER DENYING HEARING AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 2, Civil No. A024519

In the Supreme Court of the State of California
IN BANK

VOLKSWAGEN OF AMERICA, INC.,
Petitioner,

v.

SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO,
Respondent;

NOSSE et al., Real Parties in Interest.

Petition for hearing DENIED.

s/ Bird
Chief Justice

(Stamped "Supreme Court, Filed, February 1, 1984, Laurence P. Gill, Clerk")

APPENDIX "B"
OPINION DATED NOVEMBER 23, 1983

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION TWO

VOLKSWAGEN OF AMERICA, INC.,

Petitioner,

vs.

SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

JOAN NOSSE, ET AL.,

Real Parties in Interest

BY THE COURT:

The petition for writ of mandate is denied.

(Rouse, J. is of the opinion the petition should be granted).

Dated November 23, 1983

s/
P.J.

APPENDIX "C"
ORDER DATED SEPTEMBER 6, 1983

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT 3

JOAN NOSSE, et al.,

Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,

Defendant.

In Open Court September 6, 1983
No. 780-024

Plaintiffs' Motion for an Order Regarding Notice to Class and Allocation of Cost of Notice, heretofore submitted, is GRANTED as follows:

Notice in the form approved by the Court [5a-10a, *infra*] given by single publication in the San Jose *Mercury*, the Oakland *Tribune*, the San Francisco *Chronicle* and *Examiner*, the Los Angeles *Times*, the Los Angeles *Herald Examiner*, the San Diego *Union Tribune*, the Fresno *Bee*, the Bakersfield *Californian*, the Riverside *Press*, the Redding *Record Searchlight*, and in each additional newspaper included on the list attached to the Declaration of Samuel A. Krantz herein. The Notice must be at least one quarter of a page. The Re-

quest for Exclusion shall be in the form specified in the letter of Mark A. Chavez dated August 29, 1983. Plaintiffs shall advance 25% of the cost of such notice and defendant shall advance 75% of the cost of such notice.

Defendant shall have the right at its sole expense to cause additional notice to be given by publication or by direct mail, provided that counsel for the plaintiffs and the Court are advised in writing at least 10 days prior to the distribution of any such additional notice.

s/Stuart R. Pollak
STUART R. POLLAK
Judge of the Superior Court

**(CLASS NOTICE
CONFORMED TO ORDER DATED 9/6/83)**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO**

JOAN NOSSE, et al., Individually and on behalf of all persons similarly situated,

Plaintiffs,

vs.

VOLKSWAGEN OF AMERICA, INC., et al.,

Defendants.

NOTICE TO ALL PERSONS RESIDING IN CALIFORNIA WHO, AT ANY TIME BETWEEN MAY 7, 1976 AND MAY 1, 1979, OWNED A 1974-1980 VOLKSWAGEN MANUFACTURED RABBIT, DASHER, SCIROCCO, OR AUDI AND WHO HAVE REGISTERED SUCH VEHICLE WITH THE CALIFORNIA DEPARTMENT OF MOTOR VEHICLES.

1. Please take notice that on January 6, 1983, the Court hearing this case ordered that this action may proceed as a class action with the plaintiffs acting as representatives of the class of all persons fitting the description of vehicle owners set forth above. This notice is being sent to you since it appears that you may be a member of the class of persons described above and that you may be affected by the pendency of this action.

2. On May 7, 1981, the above-referenced class action was initiated by plaintiffs Joan Nosse, Jerry Kane, Katherine Fang and Tao Fang, Cliff Hoffman and Gwen Wong, on behalf of themselves and a class of persons subsequently ordered as fitting within the description of vehicle owners set forth above, against Volkswagen of America Inc. ("VWoA"), et al. The plaintiffs claim that VWoA is liable for damages allegedly sustained due to the installation of an allegedly defective valve stem seal in 1974-1980 Rabbit, Dasher, Scirocco and Audi model vehicles. The plaintiffs maintain that defects in this part caused excessive oil consumption, occasional engine seizure, excessive wear and tear and other related engine problems. On January 6, 1983, the Court ordered that this action will be permitted to proceed against defendant for: (1) breach of express warranty, (2) breach of implied warranty, (3) intentional misrepresentation—concealment, (4) negligent misrepresentation, and (5) unfair business practices. No damages are sought for any personal injuries, damages to the vehicle other than as mentioned above, or diminution in the value of your vehicle allegedly caused by the alleged defect.

3. In the event liability is established, the plaintiffs have asked the Court to award damages to an estimated 200,000 class members totaling $26 million. Plaintiffs' damage estimate includes $18,750,000 due to excessive oil consumption and $7,500,000 in consequential damages allegedly suffered by members of the class. According to plaintiffs' estimates, the average damage claim for each class member for excessive oil consumption may exceed $50.00 for each year that class members owned a vehicle covered by the class, until the valve stem seals were replaced.

This figure may vary depending on the length of ownership, number of miles driven and other factors. Additional consequential damages suffered by each class member, if any, will depend on actual out-of-pocket expenses they may have had on their vehicles, including replaced valve stem seals, parts, repairs, replaced engines, etc. Plaintiffs also seek to require defendant to replace all allegedly defective valve stem seals free of charge and request an award of punitive damages. The amount of any individual damages awarded will vary with the facts of each case and may only be nominal. Plaintiffs also seek reasonable attorneys' fees and costs, which plaintiffs' attorneys estimate will total less than $500,000. Plaintiffs' attorneys will attempt to obtain these fees and costs from VWoA in addition to any damage awards, but, if they are unable to do so, the fees and costs may have to be paid out of any total damage award. In the event plaintiffs are not successful in this action, plaintiffs' attorneys will not be entitled to recover any attorneys' fees or costs. In no event will members be asked to contribute to any such fees or costs.

4. VWoA denies all liability. It claims that any damage sustained by plaintiffs was a resulf of their own negligence and careless use, operation, maintenance and service of the vehicles. VWoA also maintains that the valve stem seals referred to were not defective. In addition, VWoA raises defenses to plaintiffs' claims including the defense that plaintiffs' claims are barred by various applicable statutes of limitation and that plaintiffs delayed for an unreasonable length of time in asserting their claims against VWoA.

5. THE COURT'S ORDER THAT THIS ACTION MAY PROCEED AS A CLASS ACTION IS NOT A DETERMINATION OF THE MERITS OF ANY OF THE CLAIMS ASSERTED BY THE PLAINTIFFS AND IS ONLY A PRELIMINARY PROCEDURAL DETERMINATION AS TO THE POTENTIAL PARTIES INVOLVED. This notice is not to be understood as an expression of any opinion by the Court as to the merits of any claims or defenses made by either side in this litigation. It is sent to you for the purpose of informing you of the pendency of this litigation so that you may make appropriate decisions as to the steps you may wish to take in relation to this lawsuit.

6. You may choose whether or not to be a member of the class in this action. If you decide to remain part of the class, you will be eligible to participate in the benefits of the judgment, in the event plaintiffs are able to prevail. In this event, you need do nothing more, and plaintiffs' present counsel will represent your interests. If you choose to remain a member of the class, you will be bound by any adverse decision. You also have the option, if you decide to remain a member of the class, to ask the Court for permission to appear as a named class co-representative and/or, if you so desire, enter an appearance through counsel of your own choosing. If you choose not to be a member of the class, you may file an individual action or pursue alternative remedies for any claim that you might have.

Anyone who does not want to be a member of the class in this case may exclude himself from the class and the action by giving written notice on the coupon at the end of this Notice and mail it to:

Clerk of the Superior Court
City and County of San Francisco
Post Office Box Number
San Francisco, California 94

Unless it is submitted, you will be bound by the judgment in this case whether favorable or unfavorable. It must be submitted on or before to be effective.

8. If you do not request exclusion from the class or if you do not appear through counsel of your own choosing, the counsel for plaintiffs will represent your interests in this lawsuit. Plaintiffs are represented by:

Gilbert T. Graham, Esq.
240 Stockton Street, Suite 300
San Francisco, CA 94108

William Weiner, Esq.
465 California Street, Suite 400
San Francisco, CA 94104

VWoA is represented by:

Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, CA 94104

DATED: 1983

HON. STUART R. POLLAK
Judge of the San Francisco
Superior Court

REQUEST FOR EXCLUSION

I (we) do not wish to be a member of the class of persons on whose behalf *Nosse v. VWoA,* No. 780-024 (S.F.Sup. Ct.) is being maintained, nor to participate in any capacity in the case, nor to be bound by any judgment therein.

First Name	Middle Initial	Last Name

Street Address

City	State	Zip Code

Signature

APPENDIX "D"
LETTER FROM PILLSBURY, MADISON & SUTRO DATED MARCH 28, 1984

March 28, 1984

Volkswagen of America, Inc.
Litigation — Nosse

Mr. Laurence P. Gill
Clerk, Supreme Court
Room 4250 State Building
San Francisco, CA 94102

Dear Mr. Gill:

Enclosed is the original and fifteen copies of a Notice of Appeal that we have prepared for filing in your court. Please file the original and fourteen copies and return a file stamped copy to me in the enclosed envelope.

Although we have previously been advised that the California Supreme Court will not accept the Notice of Appeal for filing, we believe that it may have to be filed in the California Supreme Court in order to comply with the rules for taking an appeal to the United States Supreme Court. In order to protect our right of appeal, therefore, we are requesting that you accept this document for filing.

If you decline to file the Notice of Appeal, I would greatly appreciate it if you would explain why the Notice of Appeal cannot be filed in the California Supreme Court.

Thank you for your assistance and cooperation in this matter.

Very truly yours,

s/Mark A. Chavez
Mark A. Chavez

Enc.

APPENDIX "E"
NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

VOLKSWAGEN OF AMERICA, INC.,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

JOAN NOSSE, et al., Individually and on behalf of all persons similarly situated,

Real Parties in Interest.

PLEASE TAKE NOTICE that *VOLKSWAGEN OF AMERICA, INC.* ("VWoA"), the petitioner and defendant in this action, hereby appeals to the Supreme Court of the United States from the Order re Notifying Class Members entered by the Superior Court, the Order of the Court of Appeal denying VWoA's Petition for Writ of Mandate and the final Order entered by the Supreme Court of California on February 1, 1984 denying VWoA's Petition for Hearing.

This appeal is taken pursuant to the provisions of 28 U.S.C. section 1257(2).

Dated: March 28, 1984

PILLSBURY, MADISON & SUTRO
WALTER R. ALLAN
W. ROBERT BUXTON
MARK A. CHAVEZ

By s/Mark Chavez
Attorneys for Appellant
and Defendant
Volkswagen of America, Inc.

HERZFELD & RUBIN
DANIEL V. GSOVSKI
40 Wall Street
New York, N.Y. 10005

Of Counsel

(Stamped "Received, 84 Apr. 10,
p. 2:29, Supreme Court, San Francisco")

APPENDIX "F"
NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

VOLKSWAGEN OF AMERICA, INC.,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

JOAN NOSSE, et al., Individually and on behalf of all persons similarly situated,

Real Parties in Interest.

PLEASE TAKE NOTICE that *VOLKSWAGEN OF AMERICA, INC.* ("VWoA"), the petitioner and defendant in this action, hereby appeals to the Supreme Court of the United States from the final Order entered by the Supreme Court of California on February 1, 1984 denying VWoA's petition for Hearing.

This appeal is taken pursuant to the provisions of 28 U.S.C. section 1257(2).

Dated: February 9, 1984

PILLSBURY, MADISON
& SUTRO
WALTER R. ALLAN
W. ROBERT BUXTON
MARK A. CHAVEZ

By s/Mark A. Chavez
Attorneys for Appellant
and Defendant
Volkswagen of America, Inc.

HERZFELD & RUBIN
DANIEL V. GSOVSKI
40 Wall Street
New York, N.Y. 10005
Of Counsel

(Stamped "Filed Feb. 10, 1984, Court of Appeals,
First App. Dist., Clifford C. Porter, Clerk")

APPENDIX "G"
PETITION FOR HEARING

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

VOLKSWAGEN OF AMERICA, INC.,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

JOAN NOSSE, et al., Individually and on behalf of all persons similarly situated,

Real Parties in Interest.

To the Honorable Rose Elizabeth Bird, Chief Justice of California, and to the Honorable Associate Justices of the Supreme Court of the State of California:

A hearing should be granted because:

1. The trial court's order permanently deprives petitioner of property without a determination on the merits or adequate security, thus violating petitioner's right to due process of law. To the extent that section 1781(d) of the California Civil Code

authorizes the order below, the section contravenes the due process clauses of the Federal and California Constitutions. This Court has consistently held that prerogative writs should issue where such important rights are violated and such fundamental issues are raised.

2. This proceeding also raises an important question of first impression of general significance for class action litigation throughout the state, i.e., what procedural safeguards must be afforded to a class action defendant before it can be constitutionally required to bear all or part of the costs of class notice.[1]

STATEMENT OF THE CASE

This is a class action brought on behalf of certain current and former owners of 1974-1979 model year automobiles distributed by Volkswagen of America ("VWoA"). Plaintiffs claim that "many" valve stem seals (internal engine parts) in vehicles were insufficiently long-lived (Appendix to Petition for Writ ("App."), p. 42). The complaint requests twenty-six million dollars in damages for the cost of "excessive" oil consumption caused any class member by those seals, repair costs for engine damage, if it occurred, and for other incidental and consequential damages if caused by defective valve stem seals in a particular vehicle (App., pp. 11-12, 13, 18-19).

On September 6, 1983, after briefing and argument by the parties, respondent court ordered that class notice be given by a single publication in newspapers circulating throughout California (App., p. 419). The total publication costs are estimated by real parties to be in excess of $30,000 (App., p.

407-409). Although there was no hearing or determination on the merits, VWoA was ordered to "advance" 75 percent of the costs of that notice, *i.e.*, to expend at least $23,000 on behalf of the real parties, *without* security. Apparently, the respondent court relied, without saying so, on section 1781(d) of the Civil Code.

Moreover, there has never been any showing or determination that real parties will ever be able to bear their own costs if they fail to prevail on the merits in this case. Nevertheless, respondent refused to require any security.

Petitioner timely sought a writ of mandate from the Court of Appeal to obtain appellate review of respondent court's class notice order. The Court of Appeal ordered real parties to file a response to the petition. After considering the petition and the response, the Court of Appeal, with one justice dissenting, denied the petition on November 23, 1983 (Exh. A).

ARGUMENT

* * *

II. THE CLASS NOTICE ORDER PERMANENTLY DEPRIVES PETITIONER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Due process prohibits any taking of property without "notice and opportunity for hearing appropriate to the nature of the case" (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313). Whether due process requirements are met in a particular case is analyzed in two stages. First, it must be determined whether a constitutionally protected interest is taken (*Logan v. Zimmerman Brush*

Co. (1982) 455 U.S. 422, 428). Second, there must be a determination that the process by which the protected interest is taken i[s] constitutionally adequate (ibid.). In the present case, both the presence of a protected interest and the absence of the constitutionally required process are manifest.

A. The Class Notice Order Permanently Deprives Petitioner of its Constitutionally Protected Property.

Although by its literal terms the class notice order only directs VWoA to "advance" 75 percent of the notice costs, the practical effect of the order is to permanently deprive VWoA of at least $23,000.[2] Petitioner's property interest in $23,000 is entitled to the same due process protection as any other property interest (*North Georgia Finishing Inc. v. Di-Chem, Inc.* (1975) 419 U.S. 601, 608).[3]

The final and permanent nature of the deprivation here is underscored by respondent court's failure to require real parties to post a bond or other appropriate security for the notice costs. Thus, petitioner is left without any protection against substantial financial loss even if it prevails on the merits or the respondent court's certification order is later modified or rescinded. Far less substantial and permanent deprivations have been uniformly held subject to due process standards, *e.g., Snaidach v. Family Finance Corp.* (1969) 395 U.S. 337; *Macallop v. Carberry* (1970) 1 Cal. 3d 903 (wage garnishment); *Fuentes v. Shevin* (1972) 407 U.S. 67 (replevin of household goods); *North Georgia Finishing Inc. v. Di-Chem, Inc.* (1975) 419 U.S. 601 (prejudgment attachment of property securing a com-

mercial deed); *Blair v. Pitchess* (1971) 5 Cal. 3d 258 (claim and delivery); *Randone v. Appellate Dept.* (1971) 5 Cal. 3d 536 (prejudgment attachment of checking accounts).

B. The Deprivation Does not Comply with the Requirements of Procedural Due Process

This action is still at a preliminary stage. No proceedings on the merits have been held, there has not been a presentation of contested evidence or even a preliminary determination on the merits. Even the class certification order is conditional and subject to revision (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821). Nevertheless, petitioner is ordered to make a substantial expenditure with virtual certainty that it will never recover a penny of those funds should it prevail.

In every case involving a deprivation of property, the interests that are affected must be weighed to determine the precise nature of the hearing required to satisfy due process (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334-335). The United States Supreme Court has identified the factors which must be considered in this process:

> "These include the importance of the private interest and the length or finality of the deprivation [citations omitted], the likelihood of governmental error [citation omitted], and the magnitude of the governmental interests involved" (*Logan v. Zimmerman Brush Co.*, supra, 455 U.S. at 435).

In assessing these specific factors, the courts should further bear in mind the overriding purpose of due

process in protecting "the particular interests of the person whose possessions are about to be taken" (*Fuentes v. Shevin,* supra, 407 U.S. at 90, n. 22).

These factors demonstrate the unconstitutionality of the "process" afforded petitioner. The "private interest" at stake here is petitioner's fundamental right to its property. Deprivation of this interest will be final. Even if VWoA prevails on the merits, it will be unable to recover any of the funds expended on class notice. In view of the absence of any determination or even a preliminary consideration of the merits, the outcome of this action is as much in doubt as on the day it was filed. There is, accordingly, a strong "likelihood of governmental error."

Under the circumstances, due process requires that a determination guaranteeing real parties at least some success on the merits must precede a permanent cost-shifting decision (see *Armstrong v. Manzo* (1965) 380 U.S. 545, 552; *Pratt v. Taylor* (1981) 451 U.S. 527, 540). *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal. 3d 362, the only California case sustaining the imposition of notice costs upon a class action defendant, fully supports this view. The defendant insurer in that case disclaimed coverage under a medical expense clause. Plaintiff successfully moved for partial summary judgment on that issue. "As a practical matter this motion requested the court to resolve the principal legal issue presented by the case" (22 Cal. 3d at 369). The trial court's grant of partial summary judgment rendered the subsequent class notice order "invulnerable" to a procedural due process challenge because it "realistically assured the plaintiff class at least a partial victory in its lawsuit" (22 Cal. 3d 381).[4]

By contrast, there have not been any proceedings or determinations on the merits in this case. Constitutionally, no "hearing appropriate to the nature" of the final deprivation in this case has been held (see *Mullane v. Central Hanover Bank and Trust Co.*, supra, 334 U.S. at 313). At the very minimum, a hearing should have been conducted under the standards applied in preliminary injunction hearings. Before issuing a preliminary injunction, the trial court must consider whether defendant will suffer greater injury from granting preliminary relief than plaintiff from its denial *and* whether there is a reasonable possibility plaintiff will prevail on the merits. (See *People v. James* (1981) 122 Cal. App. 3d 25, 39). Even when those determinations are in favor of an injunction, the injunction cannot issue without a bond (Code Civ. Proc., §529) (Footnote omitted). The fundamental fairness which is the essence of due process of law require no less here.

Because of its failure to meet the procedural standards required for a permanent deprivation of property, or to provide adequate security against such deprivation, the respondent court's cost-shifting order must be reversed. To the extent that Civil Code, section 1781 (d) authorizes the cost-shifting order made below, it violates the Federal and California Constitutions.

* * *

IV. IN ADDITION, THE NOTICE ORDERED IS LEGALLY AND CONSTITUTIONALLY INADEQUATE

Respondent court ordered notice to the class by a one-time publication in newspapers which should, in the aggregate, circulate in all California counties. Such notice is insufficient to satisfy the governing legal standards.

As a general rule in class actions, individual notice of the nature and pendency of a case is required (*Cooper v. American Savings & Loan Association* (1976) 55 Cal. App. 3d 274, 285; *Kass v. Young,* supra, 67 Cal. App. 3d 100, 106). Notice by publication is permissible only where the "class membership is huge, the damages are minimal and res judicata and other problems * * * are insignificant" (*Cooper v. American Savings & Loan Ass'n,* supra, 55 Cal. App. 3d at 285). Conversely, where there is a real prospect of multiple litigation over the class action claims, individual notice is "essential" to protect the interests of absent class members and the court (see *Cooper v. American Savings & Loan Association,* supra, 55 Cal. App. 3d at 285-286; *Cartt v. Superior Court,* supra, 50 Cal. App. 3d at 969, 972-973).[7]

The damages claimed on behalf of class members in this action are far from minimal (App., pp. 11-12, 13, 42). According to real parties, the damages for "excessive" oil consumption alone may amount to several hundred dollars for each of the estimated 200,000 class members (App., p. 397). Damages claimed for engine damage may exceed $1,000 for some individuals (App., p. 4). In addition, the real parties claim $7,500,000 in consequential damages for the class (App., p. 42).

Thirty actions have been filed against VWoA facially raising claims encompassed within real parties' complaint (App. pp. 284, 294-297). Some of these actions were filed after the initiation of the instant case. There is both a present reality of multiple litigation and a concrete prospect of future litigation involving the class action claims.

Under the circumstances, individual notice should be required to protect the interests of absent class members whose rights will be adjudicated in this action and to preserve the integrity of the class action process. The class notice ordered by the respondent court neither protects the due process rights of class members nor preserves the integrity of the class action process. (Footnote omitted).

* * *

FOOTNOTES

1. This proceeding raises additional issues concerning the standards that must be applied in imposing notice costs upon defendants and ordering class notice. To the extent that section 1781(d) of the Civil Code authorizes discretion to impose notice costs or the notice ordered in this case, it unconstitutionally deprives petitioner and absent class members of due process of law. The lower courts need appellate guidance on these issues.

2. Real parties argued, somewhat disingenously, before the Court of Appeal that there is nothing to suggest that the deprivations would in fact be permanent. In fact, there are no feasible means of recovering notice costs from the individual members of an unsuccessful class action. The amount of the costs that may be assessed against each member of the class are so small that it would be prohibitively expensive to pursue a collection action against any of the individuals. Moreover, the individual named plaintiffs have repeatedly represented to the trial court that they do not have the financial resources to bear notice costs. If these representations are correct, it is extremely unlikely that VWoA will recover its notice costs.

3. The obvious constitutional implications of the absence of any realistic possibility of reimbursement for ostensibly "interim" cost-shifting orders in class actions has been recognized by courts and commentators (see, e.g., *Cartt v. Superior Court* (1975) 50 Cal. App. 3d 960, 975; *Eisen v. Carlisle & Jacquelin* (1973) 479 F.2d 1005, 1009 at n. 5 1013, 1020 (Hays, J., concurring) (2d Cir.), affirmed (1974) 417 U.S. 156; *Berland v. Mack* (S.D.N.Y. 1969) 48 F.R.D. 121, 131-132; McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues* (1974) 25 Hast. L. Jour. 1351, 1398-1399); Recent Developments, *Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice*

Costs in Class Action Rejected (1973) 73 Col. L. Rev. 1641, 1653-1655; Note, *Allocation of Identification Costs in Class Actions, Sanders v. Levy* (1978) 91 Harv. L. Rev. 703, 711 at no. 60; Comment, *Cost Allocation in California Class Actions* (1976) 13 Cal. W. L. Rev. 65, 80-81).

4. *Civil Service,* supra, contains *dicta* on the broader constitutional question of the proprietary (sic) of cost-shifting in class actions. Much if not all of that discussion, however, is not applicable here. In fact, the four member majority opinion is largely concerned with substantive due process issues not raised here, and not even thoroughly argued by the parties in *Civil Service.* Since procedural due process was clearly satisfied by partial summary judgment for plaintiffs, *Civil Service* should not be read as controlling beyond the facts of that case.

* * *

7. This rule is fully and explicitly in accord with Federal constitutional considerations underlying the United States Supreme Court's guidelines for notice under Rule 23, Federal Rules of Civil Procedure. Specifically, that court has emphatically endorsed the statement by the drafters of federal Rule 23 that the requirement of individual notice in damage class actions is specifically designed to fulfill Federal due process requirements (*Eisen v. Carlisle & Jacqueline* (1974) 417 U.S. 156, 173-174). Notice is the "touchstone of due process in a class action" (*id.,* at 176). Lastly, the court categorically rejected the notion that forcing a reluctant defendant to expend funds to finance a case against itself could be justified by *res judicata* considerations:

> "We also note that the representative plaintiff in [*Eisen,* supra], argued, without success, that the defendants should pay part of the cost of notice because of the supposed res judicata benefits to them

from class-action treatment. [citation omitted] We did not think then, nor do we now, that an unwilling defendant should be forced to purchase these 'benefits' " (*Oppenheimer Fund Inc. v. Sanders* (1978) 437 U.S. 340, n. 30 at 361).

APPENDIX "H"

OPPOSITION TO PETITION FOR WRIT OF MANDATE

COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

VOLKSWAGEN OF AMERICA, INC.,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

JOAN NOSSE, et al., Individually and on behalf of all persons similarly situated,

Real Parties in Interest.

OPPOSITION TO PETITION FOR WRIT OF MANDATE

INTRODUCTION

The Petition for Writ of Mandate filed herein contends that Petitioner has been deprived of due process by an order of Respondent Court ordering publication of a class action notice in 62 different newspapers reaching every county in California, with Petitioner

being given the right to notify other class members by mail or other means if it wishes to do so, and dividing the costs of publication by a ratio of ¾ to Petitioner and ¼ to plaintiff class members. Real Parties submit that said Petition raises no new or novel issues which have not already been determined by California courts, and that, contrary to Petitioner's assertion, all of the primary issues herein have already been determined in the seminal case of *Civil Service Employees Insurance Company v. Superior Court* (1978) 22 C. 3d 362. Real Parties submit that neither the method of notice nor the allocation of costs of notice can possibly constitute an abuse of discretion by Respondent Court.

STATEMENT OF THE CASE

* * *

On March 2, 1983, plaintiffs filed a motion for an order regarding notice to class and allocation of costs. In support of said motion, Real Parties pointed out the favor in which consumer class actions are viewed by the California Legislature and appellate courts, and emphasized that the primary benefit of the notice of class action at this stage of the proceedings is to the courts and the defendant, in that once a binding class judgment is entered other plaintiffs with similar grievances will not be able to burden the already-congested courts with similar claims, and the decision would act as *res judicata* on similar claims presented against the defendant. Real Parties noted that the California Supreme Court had specifically ruled in *Civil Service Employees Insurance Company v. Superior Court, supra,* that "in California, in contrast to the federal realm, the Legislature has specifically

authorized the trial courts in class actions to impose the costs of notice upon either the plaintiff or the defendant." *Id.*, at 376.

In support of their motion, Real Parties attached declarations of the plaintiffs stating that in view of the probable cost, and "because of my limited financial resources and the relatively small amount of damages which I personally am claiming in this action, I am financially unable to carry the burden of paying for notice to the class in this action." Appendix, pp. 72-77. Real Parties also attached as exhibits information on the cost of direct mailing and publication; certified records of the complaint issued by the Federal Trade Commission on April 1, 1981 against Volkswagen of America, alleging that "an abnormally high number of Volkswagen and Audi vehicles sold in the United States beginning in 1974 model year and continuing at least through the 1979 model year and equipped with water-cooled engines have experienced, are experiencing, or are likely to experience" engine problems which may require extensive engine repairs when high rates of oil consumption are experienced, including but not limited to replacement of valve stem seals, replacement of cylinder heads, or other valve repairs. Appendix, pp. 79-81, and supporting papers; Appendix pp. 82-97; and papers documenting the proceeding against VWOA before the Environmental Protection Agency, including a recall by the Agency for VWOA's failure to meet federal emission standards. Appendix, pp. 98-105.

Plaintiffs' motion was also based upon all the pleadings, papers and records on file in this action, which included all of the voluminous materials attached to plaintiffs' previous motion for class certification.

This evidence also included the recall that VWOA had undertaken for 1977-1979 Rabbits and Sciroccos, wherein it adopted a nationwide program agreeing to replace the valve stem seal which is being challenged as defective in this action, and to compensate any owners who had previously replaced said part for up to $125. See Appendix, p. 56, citing memo on class certification and accompanying footnotes. (Footnote omitted).

Further evidence of the merits of plaintiffs' class claims was the fact that ever since VWOA changed the type and composition of valve stem seals placed in their vehicles in the April, 1979 production, replacement figures indicate that the problem with excessive oil consumption and related loss had ceased to exist. (Appendix, p. 56). (Footnote omitted).

In an attempt that Real Parties' counsel regarded as harassment and intimidation, VWOA's attorneys then attempted to depose all of the class representatives and ask them extremely detailed and personal questions, basically constituting a post-judgment creditor's examination. (Footnote omitted). VWOA then filed a motion to compel responses to said questions, which Real Parties vigorously opposed. (Footnote omitted). Respondent Court ruled as follows:

> "It seems to me much more important than the analysis of this individual's financial resources in an analysis of the amount of the claim in relationship to the cost involved and the number of parties to whom notice is going to be given, and so forth. And it just seems to me the answers to these questions about this person's financial resources are of really marginal relevance to a proper determination of what to do about notice." Appendix, p. 190.

The Court then ordered the six declarations of plaintiffs stricken, and references to their financial capabilities in the Memorandum of Points and Authorities similarly stricken. Petitioner did not seek reconsideration or appellate review of said Order, either then or in its present Petition for Writ of Mandate.

THE CLASS NOTICE ORDER

On September 6, 1983, Respondent Court ordered that class notice be given by a single publication at least one-quarter of a page in size in 62 different newspapers registered as official publications in all 52 counties in California. (Footnote omitted). This Order followed substantial briefs on all of the questions involved, and multiple hearings before the court on all of the various issues raised by the motion. The Court eventually ordered that "plaintiffs shall advance 25% of the cost of such notice and defendant shall advance 75% of the cost of such notice." Appendix, p. 419. The Court also ruled:

> "Defendant shall have the right at its sole expense to cause additional notice to be given by publication or by direct mail, providing that counsel for the plaintiffs and the court are advised in writing at least 10 days prior to the distribution of any such additional notice." (Footnote omitted)

ARGUMENT

* * *

II

PETITIONER IS NOT DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW BY THE CLASS NOTICE ORDER CHALLENGED HEREIN

Petitioner contends that it will be deprived of due process by Respondent Court's order, based first upon its contention that said order permanently deprives Petitioner of its constitutionally protected property (Petitioner's memorandum, p. 12), and that "VWOA has virtually no chance of recovering there (sic) costs at the conclusion of the litigation." *Id.* Petitioner has absolutely no evidentiary support for said contention as a factual matter, since there is no evidence in the record at all whether or not costs could be recovered by VWOA should they be legally entitled to them.[7] The only evidence pertaining to financial capabilities was stricken by the court upon defendant's motion, and it is noteworthy that Petitioner does not seek in its Petition to reverse the court ruling which refused to compel Real Parties to provide detailed financial information in response to discovery. Thus, Petitioner does not even meet its burden of proving that it will be permanently deprived of property by the order.[8]

Petitioner next takes a quantum leap of logic by arguing that the "final and permanent nature of the deprivation is guaranteed by respondent court's failure to require Real Parties to post a bond or other appropriate security for the notice costs." Petitioner's Memo, p. 13. In addition to the *non sequitur* posited,[9] Petitioner fails to cite a single precedent involving a class action for this radical proposition. Petitioner also did not strenuously argue this point below, failing to file a motion to require plaintiffs to post a bond, or

even to make a major argument in the extensive briefs filed on the issues involved.[10]

Petitioner next argues that procedural due process has been violated by Respondent's order which it contends fails to provide a "meaningful" determination or adjudication on the merits prior to a cost allocation decision. (Petitioner's memo, pp. 14-16). In *Civil Service,* the California Supreme Court addressed the very issue which Petitioner raises. Part 2 of the *Civil Service* opinion states the issue and the answer in the argument heading to said section:

> "(Paragraph 2) The trial court did not violate defendant's due process rights in ordering it to bear the initial costs of notifying the plaintiff class of the pendency of the action." *Civil Service,* 22 C. 3d at 374.

The Court continued:

> "In California, in contrast to the federal realm, the Legislature has specifically authorized trial courts in class actions to impose the costs of notice upon either the plaintiff or the defendant. Civil Code §1781, subdivision (d), a provision of the Consumer Legal Remedies Act enacted in 1970 to facilitate consumer class actions, explicitly provides that 'if the action is permitted as a class action, the court may direct *either party* to notify each member of the class of the action.' " 22 C. 3d at 376.

The Court also indicated that previously it had approved the authority of California trial courts to impose notice costs on either party, plaintiff or defendant, in a class action, in *Vasquez v. Superior Court* (1971) 4 C. 3d 800, 820. *Civil Service Employees Insurance Company v. Superior Court, supra,* 22 C. 3d at 376.

The Court in *Civil Service* also specifically held that a trial court order authorizing the imposition of notice costs upon a defendant was not a violation of either procedural or substantive due process. 22 C. 2d at 377. The Court reasoned that the adoption of efficient class action procedures unquestionably rationally relates to the vindication of a wide range of legitimate public purposes, including protection of unwary customers from being duped by unscrupulous sellers; producing a therapeutic effect upon those sellers who indulge in fraudulent practices; aid to legitimate business enterprises by curtailing illegitimate competition; and avoidance to the judicial process of the burden of multiple litigation involving identical claims. *Id.* The Court continued, in a holding directly controlling the present Petition:

> "A class action procedure authorizing the trial court to impose notice costs upon a defendant in a particular case serves the same general public policy. In the absence of such a cost-shifting procedure, the class action mechanism might frequently be completely frustrated since the representative plaintiff, whose individual claim will ordinarily be relatively small, may often be unable to afford the initial cost of notifying all absent members of the pendency of the action. (Citations omitted). Under such circumstances, a defendant who may have improperly inflicted a small financial loss upon a great number of people could succeed in defeating a class action suit without regard to the plaintiff's case. (Citations omitted). In light of the public interest in establishing a procedure that permits such actions to be decided on their merits, such a cost-shifting procedure is neither arbitrary nor irrational and does not abridge substantive due process guarantees." *Civil Service Employees Insurance Company v. Superior Court, supra,* 22 C. 3d at 377-378.

The Court in *Civil Service* continued by noting that court orders which require a defendant, prior to judgment, to bear some litigation expenses which may aid the plaintiff's lawsuit are "by no means unusual," such as "widely used civil discovery procedures:"

> "Indeed, class action notice costs are quite analagous to discovery costs, for much of the expense typically identified with the costs of notice relates to the identification of class members from defendant's records, and defendants have frequently been required to provide such identification under traditional discovery procedures. (Citations omitted.)" *Id.* at p. 378, fn. 9.

The Court also held that there is no denial of procedural due process by such an order, "even assuming that such a taking is involved here," since "recent decisions have affirmed that a deprivation is clearly constitutional if, prior to the taking, the party facing deprivation obtains notice and a meaningful hearing as to the propriety of the deprivation. (See, *e.g.*, *Skelley v. State Personnel Board* (1975) 15 C. 3d 1984, 208-211; *Beaudreau v. Superior Court* (1975) 114 C.3d 448, 458-459.)" *Id.* at 379. The Court held that the meaningful hearing requirement was met when the trial court provided a full hearing on the issues of who should bear the costs of notifying absent class members of the pendency of the suit. The Court found that where defendant was provided a complete opportunity to argue against plaintiff's request that defendant bear the initial costs of notice burden, "under these circumstances we must assume that the trial court considered the wide range of factors that other courts have identified as relevant to the cost allocation decision (citations omitted) and, in light of such factors, exercised its discretion in favor of requiring defendant to bear the cost of notice." *Id.* at 380. In the

present case below, all of the relevant factors set forth in the applicable case law were argued at length by the parties, both in their briefs and in open court. In light of this clear holding of *Civil Service*, Petitioner's due process argument is without merit.

Petitioner's slim if not only hope for a distinction from *Civil Service* is its argument that in that case, the plaintiff had already moved for a partial summary judgment on an affirmative defense, so that the plaintiff class was realistically assured at least a partial victory in its lawsuit. (Petitioner's memo, pp. 15-16).

However, there is no question that the factor cited by Petitioner was dictum in *Civil Service* and unnecessary to its decision. The Court first ruled out defendant's argument that despite the fact that it was afforded full notice and a hearing on the costs of notice issue, procedural due process requisites were not satisfied because the court order shifted the initial costs of notice prior to the court's final determination of the merits of the action:

> "As the numerous statutory procedures governing the imposition of discovery and expert witness costs illustrate, however, procedural due process is not offended by court order which—after notice and hearing on the factors relevant to the interim costs allocation decision—imposes some of the ongoing litigation costs on a defendant without a final determination on the merits of the case. Although, as the decisions cited above indicate, the trial court's preliminary view of the strength of plaintiff's claim may be a proper factor in the court's allocation of notice costs, a final judgment on the merits is not a due process prerequisite to an interim court order imposing litigation costs on a defendant (*c.f., Oppenheimer Fund Inc. v. Sanders, supra*, 437 U.S. 340).

> "*Moreover,* the trial court order in the present case is particularly invulnerable to a procedural due process challenge for, as we have seen, at the time the trial court issued the order the court had already rendered partial summary judgment for plaintiff on two of the principal legal issues raised in the case . . . " *Civil Service Employees Insurance Company v. Superior Court,* 22 C. 3d at 380-381. (Emphasis added).

Petitioner admits that prior determinations of merit are "probably not permissible, in that 'class actions must be resolved' prior to any determination of the action (citations omitted)." Petitioner's memo, p. 14, fn. In fact, in *Civil Service* the defendant argued that the trial court had entered an order violating its rights to due process by passing on the merits of a plaintiff's substantive claim in a class action before notification of the pendency of the action to absent class members, citing *Home Savings & Loan Association v. Superior Court* (1975) 42 C.A.3d 1006; *Home Savings & Loan Association v. Superior Court* (1976) 54 C.A.3d 208; and *People v. Pacific Land Research Company* (1977) 20 C.3d 10, 16, which held that "the defendant in a class action has a due process right to secure a determination of the issues relating to the suitability of the action as a class matter as well as the composition of the class and the form of notice to the members, prior to determination of the merits of the action." The reason for this holding, as explained in *Pacific Land Research* and set forth in *Civil Service,* is that "unless a decision on the merits is postponed until after the class issues are decided, a defendant is subject to "one way intervention" which would allow potential class members to elect whether to join in the action depending upon the outcome of the decision on the merits." *Civil Service,* at 372. However, the Court in *Civil Service* avoided this issue by holding that defendant therein had waived whatever rights it

might be afforded by the *Home* decision, since it did not object to the trial court's entertainment of the motion prior to the class certification.

Thus, Petitioner's argument that it is deprived of due process by an order which shifts the cost of notice prior to a determination of the merits, while at the same time arguing that there cannot be a determination of merits prior to a determination of the class issues, is both circular and vacuous. Said argument would limit the principles of *Civil Service* to the singular and rare instance where a defendant had waived a prior determination of merits before the determination of class issues.

In a last straw argument, Petitioner asserts that "at the very minimum, this hearing should have been conducted under the standards applied in preliminary injunction hearings." (Petitioner's memo, p. 16.) One of the factors which was determined by the court below was the merit of plaintiffs' claim, which was extensively briefed and argued by both parties, and Respondent necessarily made a determination regarding the "merit or lack of merit in the claim" (*Cartt v. Superior Court* (1975) 50 C.A.3d 960, 974, fn. 21), which would be similar to that found in a preliminary injunction hearing. As with most of the other novel issues asserted by Petitioner, it has no case authority whatsoever in support of this proposition. It is submitted that the case law regarding the applicable factors to be considered is sufficiently well developed to allow proper guidance to the trial courts, without adoption of a new and foreign concept in determining said issues.

***

IV.

THE NOTICE ORDERED BY RESPONDENT COURT IS LEGALLY ADEQUATE AND NOT CONSTITUTIONALLY REQUIRED.

It is clear that, unlike the federal forum and Federal Rule of Civil Procedure 23, California law does not require individual notice to members of the class. *Archibald v. Cinerama Hotels* (1976) 15 C.3d 853, 861; *Cartt v. Superior Court, supra,* 50 C.A.3d at 975.

The Court below ordered publication of one-quarter page in 62 different newspapers, registered in every county in California. This is estimated to cost approximately $30,000. In addition, the court gave defendant the right to mail individual notice if it chose to do so at its own expense, since it apparently keeps records of all current owners of VW-manufactured automobiles. This option is similar to that set forth by Justice Kaus in *Cartt v. Superior Court, supra:*

> "This, of course, would not prevent Standard from stuffing at its own expense if it desires to do so. If Standard is sincerely troubled about the *res judicata* effect of this litigation, it should be permitted to buy as much protection against future claimants as it thinks it needs." 50 C.A.3d at 974.

Under the option given by the Respondent Court, Petitioner has the right to cause additional notice to be given by *publication* or by *direct mail,* thereby giving a complete answer to Petitioner's argument that the first portion of the order neither protects due process rights of class members nor preserves the integrity of the class action process.

Petitioner's argument that Respondent's order for a single publication violates the Consumer Legal Remedies Act is to no avail, since Civil Code §1781, subdivision (d) *permits* notice by publication in accordance with Government Code §6064, rather than *requires* the four consecutive weeks provided in said section. It is clear that the large publication ordered by Respondent, with the likely press coverage incidental thereto,[14] is sufficient to provide meaningful notice to the class members involved.

Finally, it is Real Parties' contention that due process does not require notice to absent class members; *a fortiori*, any notice, and in particular the notice ordered by the Respondent, fully satisfies the Constitution.

In its seminal decision in *Handsberry v. Lee* (1940) 311 U.S. 32, the United States Supreme Court unequivocally held that due process is satisfied in a class action when the named party adequately represents the interests of absent class members. It is adequacy of representation, rather than notice of the pendency of the action, that satisfies due process.

In *Handsberry*, plaintiff property owners sought to enjoin a violation of a restrictive covenant by defendant property owners. The defendants successfully argued that a prior class action suit on identical issues was *res judicata*. The Supreme Court reversed. Instead of relying upon the fact that notice was not provided to the absent class members in the first class suit, the Court held that the original suit violated due process because that class was not adequately represented and thus *res judicata* could not be used as a defense by the defendants in the second suit.

The Court recognized the general Anglo-American rule of jurisprudence which requires notice to be provided to those who would be bound by the judgment. However, the Court identified class suits as an exception to these general rules by stating at 41-43:

> "In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree.
>
> . . .
>
> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present."

Leading commentators agree that it is adequacy of representation, not notice, that satisfies due process. See 3 B.J. Moore, *Federal Practice* §23.55 at 1152-53 (2d Ed. 1969); 7 A.C. Wright & A. Miller, *Federal Practice and Procedure* §1786, at 142-44 (1972). Directly on point and following the contention of Real Parties is *Gant v. City of Lincoln* (Neb. 1975) 225 N.W.2d 549. See also, *Lowry v. Obledo* (1980) 111 C.A.3d 14, 169 Cal. Rptr. 732.

The argument contrary to Real Parties' view is that *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306 and *Eisen v. Carlisle & Jacqueline* (1974) 417 U.S. 156 [*Eisen IV*] hold that due process requires notice to absent class members.

The widely-held view, and the view held by the California courts, is that *Eisen IV* merely interpreted

Fed. Rule Civ. Proc., §23 rather than the Constitution. *Civil Service Employees Insurance Company v. Superior Court* (1978) 22 C.3d 362; *Cartt v. Superior Court* (1975) 50 C.A.3d 960.

Mullane, supra, is not constitutional authority for requiring notice (of any type) in a consumer class action suit. *Mullane* involved a judicial settlement of a common trust fund in which the only notice given to beneficiaries was by publication. While the Court ordered the best notice practical it continuously emphasized the practicalities of the case and the expense of the endeavor as a limitation on any notice requirement.

Mullane is readily distinguishable from Real Parties' plaintiff consumer class action suit. *Mullane* was not a class action. The notice in *Mullane* was necessary to satisfy jurisdiction requirements (not one of the beneficiaries was before the Court and many were out-of-state residents). In *Mullane* the interests of the beneficiaries (income, principal, contingent, etc.) were adverse to one another. In contrast here the Respondent Court has found Real Parties' interest to be typical of the absent class members. More importantly, Respondent determined that Real Parties could and would adequately represent the absent class members. In *Mullane* the trust fund was available to pay for notice costs so that cost objections were not involved, *i.e.,* it was practical, whereas no such fund exists here. Those obtaining notice in *Mullane* were defendants, here it would be plaintiffs. Defendants there would be losing a right or claim; here plaintiffs would be gaining [the redress of] a right or claim. No beneficiary was before the court. No finding was made concerning adequate representation.

Indeed, in *Mullane*, the Court was concerned that those appointed to guard the absentees' interests would conduct fruitless contests in their name, dissipating trust funds and never have to report to their clients or obtain court approval of any stipulation or settlement. The *Mullane* Court itself disclaimed any interest in establishing a rigid rule, by stating at 313-14:

> "A construction of the due process clause which would place impossible or impractical obstacles in the way could not be justified."

Clearly, consumer class actions suits, where the cost of notice is enormous because of the number of persons wronged by the defendant's conduct, do not fit the *Mullane* model. The expense of notice in the typical large consumer class action, where individual stakes are small, may destroy the viability of the only means of pursuing those claims.

It cannot be said that in a case where the stakes are small, any type of notice satisfies anything except the conscience of the Court. The consumer who receives the notice and understands its contents (a rarity) is not accorded any right at all. See Miller, *Problems in Giving Notice in Class Actions* (1973) 58 FRD 313, 321-22. Certainly opting in or out cannot be said to be worth the cost of notice. Here, to allow an individual consumer to pursue his/her $200 claim will cost over $30,000. Yet this was Professor Kaplan's concern, the primary author of the 1966 Amendments. Kaplan, *Continuing Work of the Civil Commission: 1966 Amendments of the FRCP* (1967) 81 Harv.L.Rev. 356, 387. Even if opting in or out were important, notice does not realistically permit an intelligent deci-

sion. How will the absentee know if his/her interests are adequately protected at this point in the suit? Even if such a person obtained (at his/her cost) the Court file, he/she would not be able to decide if his/her interests are adequately represented. Notice does no one any good (although it is said to increase the *res judicata* affect for the defendant) and can create a great deal of no good. Can it really be said that if the plaintiff class loses on the merits those persons who opt out nonetheless can begin a suit against the same defendant for the same wrong? This result is not only unfair to defendant, but extraordinarily burdensome to the courts. Surely one's desire to prosecute a small consumer claim separate from that of the class which adequately represents him/her cannot be worth the cost of notice or the cost of subsequent separate suits. Since notice is not constitutionally required, it follows that the notice ordered by Respondent Court is legally adequate.

V.

CONCLUSION

Both *Civil Service Employees Insurance Company v. Superior Court* and *Cartt v. Superior Court* make it clear that individual notice to absent class members is not constitutionally required and that the trial court may constitutionally shift the costs of notice to the defendant. Meaningful notification has been provided by the Order of the Respondent Court herein, and all of the relevant factors have been appropriately considered and determined by said Court.

* * *

FOOTNOTES

7. Real Parties are forced to admit the literal truth of the quoted statement by Petitioner, but it is based on the lack of legal merit of Petitioner's defense, rather than any evidentiary basis.

8. Petitioner is not precluded from arguing that it is unlawfully deprived of financial information, as it subsequently argues (Petitioner's memorandum, p. 20). However, it may not simultaneously argue that it has established as a fact that it will be permanently deprived of property.

9. It is difficult to perceive how the court's failure to require bond *guaranteed* any deprivation, much less that it will be "final and permanent."

10. The only reference to bond found by Real Parties' counsel is a footnote in Petitioner's brief, claiming that "consequently, plaintiffs should be required to post an appropriate bond in the event VWOA is ordered to pay all or part of the costs of notice to protect VWOA's interest." Appendix, p. 223. However, no subsequent motion was made by Petitioner on this point.

14. Substantial press coverage in newspapers and on radio was attendant to the filing of the complaint herein.

APPENDIX "I"

PETITION FOR WRIT OF MANDATE

In the Court of Appeal of the State of California
First Appellate District
Division _____

VOLKSWAGEN OF AMERICA, INC.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

JOAN NOSSE, et al., Individually and on behalf of all persons similarly situated,
Real Parties in Interest.

No. _____
(San Francisco Superior Court No. 780024,
Hon. Stuart R. Pollak, Judge)

PETITION FOR WRIT OF MANDATE

To the Honorable Presiding Justice and to the Honorable Associate Justices of the Court of Appeal of the State of California, First Appellate District:

Petitioner Volkswagen of America, Inc., by this verified petition, respectfully applies for a writ of mandate and sets forth the following facts and causes for the issuance of a writ:

* * *

VIII

Respondent court has abused its discretion in issuing an order that will permanently deprive petitioner of property without due process of law and which will not provide adequate notice to absent class members. A petition for writ of mandate is an appropriate method to request review of an order for notice and for shifting costs of class notification to petitioner (*Civil Service Employers Ins. Co. v. Superior Court* (1978) 22 Cal. 3d, 362). Petitioner has no plain, speedy and adequate remedy in the ordinary course of law.

* * *

II. THE CLASS NOTICE ORDER PERMANENTLY DEPRIVES PETITIONER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The Supreme Court has explained that:

> "*** at a minimum [due process] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case" (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313).

Whether due process requirements are satisfied in a particular case involves a two-stage inquiry. First, the inquiry is whether there has been a deprivation of a protected interest (*Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 428). Second, the inquiry concerns the adequacy of the process provided (ibid.).

A. *The class notice order permanently deprives petitioner of its constitutionally protected property.*

Under respondent court's order, VWoA is required to expend at least $23,000 to assist real parties in providing notice to absent class members. Petitioner's property interest in these sums is entitled to no less due process than any other property interest.

> "It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. We are no more inclined now than we were in the past to distinguish among different types of property in applying the Due Process Clause" (*North Georgia Finishing Inc. v. Di-Chem, Inc.* (1975) 419 U.S. 601, 608).

Although by its literal terms the class notice order only directs VWoA to "advance" 75 percent of the notice costs, the practical effect of the order is to permanently deprive VWoA of at least $23,000. VWoA has virtually no chance of recovering there costs at the conclusion of the litigation.[1]

The final and permanent nature of the deprivation here is guaranteed by respondent court's failure to require real parties to post a bond or other appropriate security for the notice costs.[2] Thus, petitioner is left without any protection against substantial financial loss even if it prevails on the merits in this case. Far less substantial and permanent deprivations have been uniformly held subject to due process constraints.[3]

B. *The deprivation does not comply with the requirements of procedural due process.*

This action is still at a preliminary stage. No orders regarding a determination of the merits have been entered or made.[4] Even the class certification order is conditional and subject to revision (*Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 821). Nevertheless, petitioner is ordered to make a substantial expenditure with virtual certainty that it will never recover a penny of those funds should it prevail.

The precise nature and scope of the hearing required to satisfy due process will vary depending upon the circumstances presented (*Boddie v. Connecticut* (1971) 401 U.S. 371, 377). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands" (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481). At all times, however, the hearing provided must be meaningful and appropriate to the nature of the case (*Mullane v. Central Hanover Bank and Trust Co.*, supra, 339 U.S. at 313).

The competing governmental and private interests that are affected must be balanced to determine the adequacy of the hearing (*Mathews v. Eldrige* (1976) 424 U.S. 319, 334-335). The Supreme Court has identified the factors which must be considered in this balancing process:

> "These include the importance of the private interest and the length or finality of the deprivation [citations omitted], the likelihood of governmental error [citation omitted], and the magnitude of the governmental interests involved" (*Logan v. Zimmerman Brush Co.*, supra, 455 U.S. at 435).

In addition, to these specific factors the overriding purpose of due process must be considered in evaluating the constitutionality of particular procedures.

> "* * * Procedural due process is not intended to promote efficiency or accommodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken" (*Fuentes v. Shevin*, supra, 407 U.S. at 90, n. 22).

These factors demonstrate the unconstitutionality of the "process" afforded petitioner. The interest at stake here is the right of every individual to preserve and protect his property. The deprivation will be final. Even if VWoA prevails on the merits, it will be unable to recover any of the funds expended on class notice. In order to satisfy the requirements of due process a "meaningful" determination or adjudication on the merits must precede a cost-allocation decision (see *Armstrong v. Manzo* (1965) 380 U.S. 545, 552; *Pratt v. Taylor* (1981) 451 U.S. 527, 540).

Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal.3d 362, the only California case sustaining the imposition of notice costs upon a class action defendant, is not to the contrary. It was an action against an insurance company seeking damages for refusal to pay benefits under a medical expense clause. The defendant asserted that the policy did not require it to pay the benefits. Plaintiff moved for partial summary judgment on that affirmative defense. "As a practical matter this motion requested the court to resolve the principal legal issue presented by the case" (22 Cal.3d at 369). The trial court granted the plaintiff's motion for partial summary judgment, finding that the plaintiff's interpretation of the policy was correct as a matter of law.

> "[T]he partial summary judgment order, rejecting defendant's interpretation of its insurance policy, realistically assured the plaintiff class at least a partial victory in its lawsuit" (22 Cal. 3d 381).

The trial court's resolution of the summary judgment motion rendered the subsequent class notice order "in-

vulnerable" to a procedural due process challenge (ibid.).

By contrast, no merit determination has been made in this case. Constitutionally, no "hearing appropriate to the nature" of the final deprivation in this case has been held (see *Mullane v. Central Hanover Bank and Trust Co.*, supra, 334 U.S. at 313). At the very minimum, this hearing should have been conducted under the standards applied in preliminary injunction hearings. Before issuing a preliminary injunction the trial court must consider whether defendant will suffer greater injury from granting of the preliminary relief than plaintiff from its denial *and* whether there is reasonable probability that plaintiff prevail on the merits (*People v. James* (1981) 122 Cal. App. 3d 25, 39). Even when those determinations are made in plaintiff's favor, the injunction cannot issue without a bond (Code Civ. Proc., §529).

* * *

IV. *IN ADDITION, THE NOTICE ORDERED IS LEGALLY INADEQUATE.*

Respondent court ordered notice to the class by a one-time publication in 10 major and a number of smaller newspapers which should, in the aggregate, circulate in all California counties. Such notice is insufficient to satisfy the governing legal standards.

California courts have repeatedly emphasized the importance of providing absent class members with "appropriate notice of the pendency of a class action that will affect their interests" (*Home Savings and Loan Ass'n v. Superior Court* (1974) 42 Cal. App. 3d 1006, 1010; see also *Chance v. Superior Court* (1962) 58 Cal.2d 275, 290). The individual members of the class have a fundamental due process right to be ap-

prised of the pendency of a class action and afforded an opportunity to participate (*Eisen v. Carlisle & Jacquelin* (1974) 446 U.S. 156, 173-174). As the California Supreme Court has cautioned:

> "Because of the constitutional importance of notifying absent class members—who are suddenly before the court—such notice should not be left to the whim of litigants" (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460).

Notice is also required to protect the integrity of the class action process (see *La Sala v. American Sav. & Loan Ass'n*, supra, 5 Cal.3d at 873).

> "The principal purpose of notice to the class is the protection of the integrity of the class action process, one of the functions of which is to prevent burdening the courts with multiple claims when one will do" (*Cartt v. Superior Court*, supra, 50 Cal. App. 3d at 970).

The importance of this interest is reflected in this Court's decision in *Kass v. Young* (1977) 67 Cal. App. 3d 100, upholding an order which vacated a default judgment entered against the defendant in a class action. This Court concluded that class certification and appropriate notice in class actions are mandatory jurisdictional requirements (id., at 105).

As a general rule, individual notice is required to class members because

> "* * * it is essential for them to decide whether to remain as members of the class and become bound by the rule of res judicata; whether to intervene with their own counsel; whether to 'opt out' and pursue

their independent remedies" (*Cooper v. American Savings & Loan Association* (1976) 55 Cal. App. 3d 274, 285).

Potential plaintiffs "are entitled to the *best practical notice under the circumstances* * * *" (*Kass v. Young*, supra, 67 Cal. App. 3d at 106) (emphasis added). Notice by publication is permissible only where the "class membership is huge, the damages are minimal and res judicata and other problems * * * are insignificant" (*Cooper v. American Savings & Loan Ass'n*, supra, 55 Cal.App.3d at 285).

The damages claimed on behalf of class members in this action are far from minimal. According to real parties, the damages for "excessive" oil consumption alone may amount to several hundred dollars for each of the 200,000 class members. Damages claimed for engine damage may exceed $1,000 for some individuals. In addition, the real parties claim $7,500,000 in consequential damages for the class. "Where members of the class have a substantial claim, individual notice is required * * *" (ibid.).

The rationale of the decisions sanctioning the use of notice by publication is that where questions concerning the res judicata effect of the class action judgment on the parties are minimal due to the unlikelihood of renewed litigation and the small damages, individual notice may not be required because the financial burden of providing such notice outweighs its potential benefits (*Cartt v. Superior Court*, supra, 50 Cal. App. 3d at 969, 972-973; *Cooper v. American Savings & Loan Association*, supra, 55 Cal. App. 3d at 284-285). Conversely, where there is a real prospect of multiple litigation over the class action claims, individual notice is "essential" to protect the interests of absent class members and the court (see *Cooper v. American Savings & Loan Association*, supra, 55 Cal. App. 3d at 285-286). In every case, the court's objective in determining the appropriate type of notice to be given is to ensure that practical res judicata will be achieved between the parties through the class action. The court must attempt to

"settle the dispute between the class and the defendant for all practical, as distinguished from theoretical purposes [to ensure] that the entire class' complaint is adjudicated de facto, if not de jure" (*Cartt v. Superior Court*, supra, 50 Cal. App. 3d at 968).

Thirty actions have been filed against VWoA facially raising claims encompassed within real parties' complaint (App., pp. 284, 294-297). Some of these actions were filed after the initiation of the instant case. There is both a present reality of multiple litigation and a concrete prospect of future litigation involving the class action claims. Under the circumstances, individual notice should be required to protect the interests of absent class members whose rights will be adjudicated in this action and to preserve the integrity of the class action process. The class notice ordered by the respondent court neither protects the due process rights of class members nor preserves the integrity of the class action process.

* * *

FOOTNOTES

1. The absence of any realistic possibility of reimbursement for ostensibly "interim" cost-shifting orders in class actions has alarmed courts and commentators (see, e.g., *Cartt v. Superior Court* (1975) 50 Cal. App. 3d 960, 975; *Eisen v. Carlisle & Jacquelin* (1973) 479 F.2d 1005, 1009 at n. 5 1013, 1020 (Hays, J., concurring) (2d Cir.), affirmed (1974) 417 U.S. 156; *Berland v. Mack* (S.D.N.Y. 1969) 48 F.R.D. 121, 131-132; McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues* (1974) 25 Hast. L. Jour. 1351, 1398-1399); Recent Developments, *Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs in Class Action Rejected* (1973) 73 Col.L.Rev. 1641, 1653-1655; Note, *Allocation of Identification Costs in Class Actions, Sanders v. Levy* (1978) 91 Harv. L. Rev. 703, 711

at n. 60; Comment, *Cost Allocation in California Class Actions* (1976) 13 Cal. W.L. Rev. 65, 80-81).

2. The absence of any guarantee of reimbursement sharply differentiates this case from other circumstances in which a defendant may be required to spend funds on behalf of the plaintiffs during the initial stages of litigation. In those instances, the plaintiff is generally required to provide security to protect the defendant against loss. For example, a bond must be posted to obtain a preliminary injunction (*Elliott v. Osborne* (1851) 1 Cal. 396, 397; Code Civ. Proc., §529) and similar undertakings are required in certain professional malpractice and out-of-state plaintiff cases (Code Civ. Proc., §§1029.5; 1029.6; 1030. Similarly, the expenses of reference of water matters to a board—perhaps the only taxable litigation cost comparable in potential size to class notification expense—must be adequately provided for by the parties, subject to court approval, whenever a board believes that "the payment of the expense of any reference is not reasonably certain" (Water Code §2042).

3. In a series of decisions beginning in 1969, the courts invalidated a number of statutory provisions which failed to afford individuals these basic procedural safeguards required by due process (*Snaidach v. Family Finance Corp.* (1969) 395 U.S. 337; *Macallop v. Carberry* (1970) 1 Cal. 3d 903 (wage garnishment); *Fuentes v. Shevin* (1972) 407 U.S. 67 (replevin of household goods); *North Georgia Finishing Inc. v. Di-Chem, Inc.* (1975) 419 U.S. 601 (prejudgment attachment of property securing a commercial deed); *Blair v. Pitchess* (1971) 5 Cal. 3d 258 (claim and delivery); *Randone v. Appellate Dept.* (1971) 5 Cal. 3d 536 (prejudgment attachment of checking accounts)).

4. In fact, such determinations are probably not yet permissible. Class issues must be resolved "prior to any determination of the merits of the action" (*People v. Pacific Land Research Co.* (1977) 20 Cal. 3d 10, 16; *Home Savings & Loan Ass'n v. Superior Court* (1976) 54 Cal. App. 3d 208, 211; *Home Savings & Loan Ass'n v. Superior Court* (1975) 42 Cal. App. 3d 1006, 1015).

APPENDIX "J"

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR AN ORDER REGARDING NOTICE TO CLASS AND ALLOCATION OF COST OF NOTICE

In The Superior Court of the State of California
In and for the City and County of San Francisco

JOAN NOSSE, JERRY KANE, et al.,
Plaintiffs,

vs.

VOLKSWAGEN OF AMERICA, INC., et al.,
Defendants.

NO. 780024
Date: May 6, 1983
Time: 9:30 A.M.
Dept: Law and Motion

I. INTRODUCTION AND SUMMARY OF ARGUMENT

* * *

Defendant argues that the constitution requires both individual notice to absent class members and that the cost of such notice be borne by plaintiffs. Defendant's leading authority for it's position, indeed, the first two cases it relies on, are federal cases, *Eisen v. Carlisle & Jacquetin* (1974) 417 U.S. 156 (*Eisen IV)* and *Oppenheimer Fund, Inc. et al. v. Sanders* (1978) 437 U.S. 340. Defendant appears to

virtually ignore the California Supreme Court's decision in *Civil Service Employees Inc. Co. v. Superior Court* (1978) 22 Cal. 3d 362 (hereinafter "*Civil Service*") and the Court of Appeals language in *Cartt v. Superior Court* (1975) 50 Cal. App. 3d 960 (hereinafter *Cartt*). Both these cases and other California authority make it clear that individual notice to absent class members is not constitutionally required and that the trial court may constitutionally shift the cost of notice to the defendant.

II. *DEFENDANT'S DUE PROCESS RIGHTS ARE NOT VIOLATED BY SHIFTING THE COST OF NOTICE TO DEFENDANT.*

Defendant argues that cost shifting violates its due process rights citing *Eisen IV,* and *Oppenheimer Fund, Inc. v. Sanders, supra,* 437 U.S. 340. Defendant suggests that a well reasoned decision of the California Supreme Court ought to be rejected by this Court because it was a 4-3 decision. Considering the present membership of the California Supreme Court, the *Civil Service* decision would appear to be stronger now then when it was written in 1978. At any rate, and regardless of the present make of the California Supreme Court, even the law firm of Pillsbury, Madison & Sutro is bound by 4-3 California Supreme Court decisions.[1]

In *Civil Service,* the California Supreme Court addressed the very issue which defendant raises. Part two of the *Civil Service* opinion states the issue and the answer in one concise sentence:

> "(2) The trial court did not violate defendant's due process rights in ordering it to bear the initial cost of noti-

fying the plaintiff class of the pendency of the action." *Civil Service,* at 374.

The Supreme Court in *Civil Service,* literally addressed itself to the very cases which defendant now relies upon.

"Contrary to the present defendant's assertion, however, nothing in *Eisen IV* suggests that any absolute constitutional barrier obstructs such a preliminary cost-shifting order. Indeed, the Supreme Court's most recent class action decision, *Oppenheimer Fund, Inc. v. Sanders* (1978) 437 U.S. 340 [57 L.Ed.2d 253, 98 S.Ct. 2380] makes it clear that even under the federal rule a federal district court, in appropriate circumstances, is empowered to require a defendant to bear some of the expense entailed in identifying and notifying absent class members. Thus, the relevant federal authorities go no further than to hold that, under the present provisions of federal rule 23, a plaintiff in a federal class action is normally required to bear the "burden of financing his own suit."

In California, in contrast to the federal realm, the Legislature has specifically authorized trial courts in class actions to impose the cost of notice upon either the plaintiff or the defendant. Civil Code section 1781, subdivision (d), a provision of the Consumer Legal Remedies Act enacted in 1970 to facilitate consumer class action the court may direct *either party* to notify each member of the class of the action." (Italics added.)

A class action procedure authorizing a trial court to impose notice costs upon a defendant in a particular case serves the same general public policies. In the absence of such a cost-shifting procedure, the class action mechanism might frequently be completely frustrated since the representative plaintiff, whose individual claim will ordinarily be relatively small, may

> often be unable to afford the initial cost of notifying all absent members of the pendency of the action. (See Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin* (1973) 87 Harv.L.Rev. 426, 441-442; Comment, *Cost Allocation in California Class Actions* (1976) 13 Cal. Western L. Rev. 65, 83.) Under such circumstances, a defendant who may have improperly inflicted a small financial loss upon a great number of people could succeed in defeating a class action suit without regard to the strength of the plaintiff's claim." *Civil Service,* at 375-378.

In light of the *Civil Service* decision, defendant's due process argument is without merit.

III. *COST OF NOTICE SHOULD BE SHIFTED TO DEFENDANT IN THIS CASE.*

A. *Public policy combined with the merits of plaintiffs' cause require that costs of notice be shifted to defendant.*

As Pls. Memo re Costs indicates, both the California Courts and the California Legislature are strongly committed to promoting the consumer class action devise as a means of providing consumers with an efficient and economical mechanism to secure their rights. It is obvious that a defendant should not be able to defeat a consumer class action by inflicting a small amount of damages on a great number of people and then hide behind the fact that representative plaintiffs with small claims won't expend large sums on notice to absent plaintiffs who also have small claims. To not shift the cost is to encourage mistreatment of consumers by large corporations. See *Civil Service,* at 377-378; *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800; Consumer Legal Remedies Act, Civil Code §1760.

Plaintiffs are not relying solely on the stated expressed public policy of California. Rather plaintiffs have demonstrated that their cause is meritorious and on that basis the costs of notice should be shifted to defendant.

Plaintiffs requested that this Court take judicial notice of the FTC Complaint, Exhibit D to Pls. Memo re Costs which determined that defendant's acts were unfair, deceptive, and prejudicial to the public, causing the public injury in violation of the Federal Trade Commission Act.

Defendant's response is, at the very best disingenous. First defendant states that the Complaint is hearsay and not evidence. This Court was, and still is, asked to take judicial notice of Exhibit D and if it does so, it then is evidence. As Evidence Code §454 states, the exclusionary rules of evidence (including hearsay) do not apply to a determination as to whether or not to take judicial notice.

Next defendant disputes the fact that the EPA's Notice and Order which is Exhibit E to Pls. Memo re Costs, dealt with valve stem seals or excessive oil burning. This is *chuzpah* taken too far. Defendant does not and cannot dispute the most illuminating factor in terms of the merits of plaintiffs cause: defendant terminated EPA involvement with a limited Recall Program which offers to replace (or reimburse if already replaced) defective valve stem seals on 1977-1979 gasoline engine Rabbits and Sciroccos.[2]

Defendant literally does not even mention this singularly important point.

Further, Defendant does not dispute that since the faulty part's composition was changed, replacement figures indicate that the problem, excessive oil consumption and related loss has ceased to exist.[3]

B. *Defendant should pay for costs of notice because it is the defendant that seeks the security of res judicata not the plaintiffs.*

Defendant admits that the average plaintiff's claim in this case is $130.00. Defendant asserts that this sum, $130.00 is so significant that this Court, should fear multiple litigation. It is the courts that defendant wishes to protect, so implies the defendant. (Defendant's Memo, p. 21-22). Defendant backs up its argument with the feable assertion that "There are several actions currently pending" which encompass claims made by plaintiffs, some even filed after plaintiffs' filed suit. (Defendant's Memo, p. 22) No number of claims or complaints are supplied. No amount of damages is stated. No description of the encompassing claims is indicated. Indeed no declaration or affidavit or any evidence at all is offered in support of this statement. All we have here is defendant's attorney's bald statement, nothing more.

Yet defendant argues that notice, indeed individual notice is required. Defendant obviously seeks to halt this lawsuit by requiring plaintiffs to pay for individual, expensive notice. At the same time defendant seeks to protect itself by the subsequent use of *res judicata.*

The Court in *Cartt,* at 971-972, distinguished between those cases where plaintiffs' individual claims are significant so that renewed litigation after a class

judgmnet is an important concern and those where the plaintiffs' claim are insignificant (here $130.00, the example given in *Cartt* was $100), where it is unlikely and only a remote possibility that an absent class member would renew litigation; hence individual notice would be unnecessary.

Further, Rule 23(c) of the Federal Rules of Civil Procedure (FRCP) does not require notice of all class actions. Those rules are promulgated by the United States Supreme Court and then enacted by Congress. (28 U.S.C. §2072-2073 and FRCP 86 as amended.) The notion that *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306 requires that notice be sent to each class member is undermined by the fact that Rule 23 was amended, promulgated and enacted in 1966, fully 16 years after the *Mullane* decision. That rule indicates that no notice whatever is required for Rule 23(b)1 and (b)2 type class actions.

Moreover, the Court in *Cartt*, at 677-678, distinguished both *Mullane v. Central Hanover Bank & Trust Co., supra*, and *Eisen IV* by stressing that the former did not deal with class actions, (absent, unnamed class members) where costs were substantial compared to the benefits to be gained by each individual class member, and the latter by indicating that the case simply dealt with the specific language of FRCP 23(c), not with the Constitution. In short nothing in the Constitution requires individual notice in this action.

The notice methods suggested by plaintiffs will give defendant the assurance it seeks and shifting the cost of such notice to defendant will not permit defendant (and others like it) to defeat the salutory purposes of the consumer class action procedure.[4]

IV. *PUBLICATION AND/OR INDIVIDUAL FIRST CLASS MAIL NOTICE WILL SERVE THE INTEREST OF DEFENDANT.*

Plaintiffs' have in Pls. Memo re Costs suggested a combination of publication notice in 7 major California Newspapers in five major California cities as well as individual first class or otherwise, mailed notice to present owners of the subject vehicles as a means of satisfying defendant's desire for the subsequent use of *res judicata* should it win this lawsuit.

Nothing prevents defendant from utilizing its own Vehicle Data File or its own records of past recalls of the subject vehicles to assist it in this desire. Defendant recalled close to 500,000 Rabbits and Sciroccos in 1979 because of water leaking through the antenna socket which caused the engines of those vehicles to start at will, a safety defect. NHTSA monitors safety defect recalls and defendant to maintain records of this and other such recall campaigns.

It is odd that defendant places reliance in its brief on the California Court of Appeals case of *Cartt.* Defendant's present councel represented Real Party in Interest, Standard Oil Company of California. In that case, as here, the plaintiffs sought small sums in damages, which, given the large numbers of class members they represented added to substantial money damages which were allegedly inflicted by Standard. The trial court ordered individual mailed notices to 700,000 persons. Plaintiffs were ordered to pay the $70,000 in notice costs. Plaintiff's sought and obtained a peremptory writ directing the trial court to issue orders consistant with the views expressed in *Cartt. Cartt* held that the consumer class action devise was the precise mechanism created for such suits, and

that considering the insignificant amount of individual damages each claimant sought (*Cartt*, at 971-972, cited *Darr v. Yellow Cab Co., supra*, 67 Cal.2d 695, 702, 703 which spoke of plaintiff's $100.00 claim, here, in our suit, defendant speaks of plaitniffs' average $130.00 claims), and the little or remote likelihood of renewed litigation, that publication *not* individual notice was appropriate. The *Cartt* court suggested shifting the cost of such notice to defendant might be appropriate but since that issue was not before it, it was not decided until the California Supreme Court did so, three years later in *Civil Service.*

In short, plaintiffs have suggested a variety of ways in which defendant can protect itself and the California Courts have sanctioned these and other methods. Other methods exist. For example magazine advertising, radio and television advertising and others with which the defendant, who is more than familiar with recall programs and notice to its injured customers, is fully aware.

* * *

FOOTNOTES

1. Defendants not only ask this Court to disregard the majority opinion and embrace the minority decision in *Civil Service,* but, so convinced of its rightiousness, defendant quotes the dissent in *Civil Service* as if it were Justice Kaus' quote in *Cartt* (Memorandum of Points & Authorities In Response To Plaintiff's Motion For An Order Regarding Notice To Class And Allocation Of Cost Of Notice, p. 16, 11.14-26, hereinafter cited as "Defendant's Memo")

2. See plaintiffs' Memorandum of Points and Authorities in Support of plaintiffs' Motion for Certification of Class, pp. 12-15 and accompanying footnotes.

3. *Id.* p. 14, fn. 33.

4. This Court's Class Action Manual permits an action to proceed without any notice at all. See, Class Action Manual, §427.6.

APPENDIX "K"

MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO PLAINTIFFS' MOTION FOR AN ORDER REGARDING NOTICE TO CLASS AND ALLOCATION OF COST OF NOTICE

In the Superior Court of the State of California,
in and for the City and County of San Francisco

JOAN NOSSE, et al., Individually and on behalf of all persons similarly situated,

Plaintiffs,

vs.

VOLKSWAGEN OF AMERICA, INC., et al.,

Defendants.

No. 780024
Date: May 6, 1983
Time: 9:30 A.M.
Dept.: Law and Motion

I. *INTRODUCTION AND SUMMARY OF ARGUMENT.*

* * *

[Plaintiffs] suggest that:

> "[i]f no notification were given and plaintiffs win, then the absentees can take advantage of the judgment; if no notification were given and plaintiffs lose then the absentees are not bound" (ibid.).

Plaintiffs seek to pursue a "class action" in which a victory for them will bind the defendant with respect to the entire class but in which a defense verdict will bind only four of possibly 200,000 class members.

This position utterly misconceives the nature and purpose of a class action. Notice is indispensable both to protect the due process rights of absent class members and to safeguard the vital interest of the courts in avoiding a plethora of individual lawsuits. It is because of the importance of these interests that the courts consistently rule that notice must be provided to the class.

As a general rule plaintiffs are required to pay for their expenses in initiating and maintaining a lawsuit. This rule extends to plaintiffs acting as representatives of a class in a class action (*Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 178-197). Upon commencing a class action suit, the class representatives must be prepared to accept the concomitant responsibility of identifying absentee class members and paying the costs of providing them with notice of the action (*Oppenheimer Fund, Inc. et al v. Sanders* (1978), 437 U.S. 340, 356-359; *In Re Nissan Motor Corp. Antitrust Litigation* (5 Cir. 1977) 552 F.2d 1088, 1102).

Plaintiffs seek an exception from this general rule, relying upon *Civil Service Employers Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362. However, *Civil Service* does not authorize unrestricted imposition of notice costs upon defendants in class actions. At most, the decision permits trial courts to exercise discretion, in light of the relevant factors, in deciding whether those costs should be shifted to the defendant. Those factors in the present case demonstrate that the Court should decline to shift costs.

The Court must determine the appropriate means of notifying the class. Plaintiffs are certified to repre-

sent the class and have an obligation to insure that legally adequate notice is provided to the absent class members in the most effective manner. Yet both the method and content of notice which plaintiffs propose fail to satisfy the governing legal standards. The Court should reject plaintiffs' proposals and adopt those of the defendant to insure that legally adequate notice is provided.

II. *NOTICE MUST BE PROVIDED TO THE ABSENT CLASS MEMBERS.*

Plaintiffs argue that absent class members need no notice and that notice will only benefit the defendant (Pls. Memo., p. 7). This ignores the true purposes of class notice which include protecting the interests of the absent class members and of this Court.

Plaintiffs have assumed a fiduciary obligation to the members of the class and must protect the rights of all class members (*La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 871). Each of the named plaintiffs has acknowleged his/her special responsibilities as a class representative (Declarations In Support of Plaintiffs' Motion For Certification of Class of Joan Nosse (par. 11), of Gwen Wong (par. 11), of Jerry Kane (par. 10), of Tao Fang and Catherine Fang (par. 11), and Cliff Hoffman (par. 10) (attached as Plaintiffs Exhs. K-O to Plaintiffs' Motion for Class Certification)). Plaintiffs' counsel has also assured the Court:

> "The class representatives are protecting not only their individual interests, but also the interests of the other class members. * * * I have advised the class members of their fiduciary obligations regarding the

class, and as is evident from their declarations submitted as supporting documents to this motion, they understand the nature and gravity of this undertaking and their special responsibilities" (Decl. of William Weiner in Support of Plaintiffs' Motion for Class Certification, par. 8).

The individual members of the class have a fundamental due process right to be apprised of the pendency of this action and afforded an opportunity to participate (*Mullane v. Central Hanover Bank and Trust Co.* (1950) 339 U.S. 306). "The essentials of due process of law in class suits would appear to be afforded by fair representation in the assertion of claims of class members against the opposing parties in any lawsuit and *notice of the pending suit*" (*Chance v. Superior Court* (1962) 58 Cal.2d 275, 290 (emphasis added, citations omitted)). The court of appeals has emphasized the right of absent class members to notice in rejecting an approach to notice like that suggested by plaintiffs here:

"[O]nce the composition of the class is determined, its members are entitled to appropriate notice of the pendency of a class action that will affect their interests. Notice is particularly requisite when those purporting to represent the class seek payment of substantial compensation from all class members in the event of success. After the members of the class have been properly notified of the action, they are required to decide whether to remain members of the class represented by the plaintiffs' counsel and become bound by a favorable or unfavorable judgment in the action, whether to intervene in the action through counsel of their own choosing, or whether to 'opt out' of the action and pursue their own independent remedies, such as a negotiation with defendants, initiation of their own action or intervention in some other action" (*Home Savings and Loan Ass'n v. Superior Court* (1974) 42 Cal. App. 3d 1006, 1010)[1]; ac-

cord: *Lamb v. United Security Life Co.* (S.D. Iowa 1972) 59 F.R.D. 25, 40).

To protect the rights of absent class members, the trial court must insure that prompt and effective notice is provided. As the California Supreme Court has noted:

> "Because of the constitutional importance of notifying absent class members—who are suddenly before the court—such notice should not be left to the whim of litigants" (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460).

Providing notice to the absent class is also required to serve the interest of the court in preserving the integrity of the class action process (see *La Sala v. American Sav. & Loan Assn.,* supra, 5 Cal.3d at 873). As Justice Kaus observed, in an opinion heavily relied upon by plaintiffs:

> "The principal purpose of notice to the class is the protection of the integrity of the class action process, one of the functions of which is to prevent burdening the courts with multiple claims when one will do" (*Cartt v. Superior Court* (1975) 50 Cal. App. 3d 960, 970).

The importance of this interest is uniformly reflected in the leading decisions. For example, in *Kass v. Young* (1977) 67 Cal.App.3d 100, the court of appeals upheld the order of this Court vacating a default judgment entered against the defendant in a class action on the ground that no class had been certified and that no notice had been given to the alleged class. The court of appeals concluded that class certification and notice in class actions are mandatory jurisdictional requirements. As the court explained:

"The strong language about the necessity of these procedures and the careful explanations of the reasons for the necessity appearing not only in *Home Savings & Association* but also in *City of San Jose v. Superior Court*, 12 Cal.3d 447; *Vasquez v. Superior Court*, 4 Cal.3d 800, 820, 821; *Blue Chip Stamps v. Superior Court*, 18 Cal.3d 385, 386, are persuasive of the jurisdictional nature of prejudgment adjudication of the certifiability of the class as a class action, determination of the composition, and appropriate notification" (id., p. 105).

In sum, notice to the absent class members is required both to protect their rights and to preserve the integrity of the class action process.[2] Plaintiffs, by initiating a class action and obtaining class certification, have assumed the burden of complying with the procedural requirements of a class action, including notice. In arguing that the class is not entitled to notice, plaintiffs cast doubt upon their ability to adequately represent the interests of the absent class members in this action.

* * *

B. *Shifting Notice Costs to VWoA Would Violate Its Due Process Rights.*

The rights of absent class members can only be protected by proper and effective notice. Under the Fifth and Fourteenth Amendments to the Constitution of the United States plaintiffs' fiduciary responsibility to give and pay for such notice cannot be shifted to defendant prior to a determination on the merits. There is no discretion to force a defendant to bear plaintiffs' obligation to provide notice to the class. The arguments on both sides of the due process

question are marshalled in the majority and dissenting opinion in *Civil Service Employees Ins. Co. v. Superior Court*, (1978), 22 Cal.3d 362. In that case, a four justice majority, over a strong dissent by three members of the court, allowed a trial court to shift notice costs estimated at up to $20,000 to a defendant following partial summary judgment for plaintiffs. In the view of the majority, the issues finally adjudicated by such summary judgment "realistically assured the plaintiff class at least a partial victory in its lawsuit" (id. at 384). The bulk of both opinions is devoted to discussion of the majority view that even a preliminary hearing, as opposed to a final judgment, could provide a sufficient Constitutional basis to compel a defendant to bear the cost of class notice in an action against it. We think the dissenting opinion is the correct constitutional and statutory analysis. That is, ordering a defendant to advance notice costs for a lawsuit against it before adjudication of its liability violates defendant's right to due process of law. Civil Code Sec. 1781(d) should be read to authorize cost shifting only where there has been a determination pursuant to section 1781(c) that there is no defense to the action (id., 382-387).

Judge Kaus' counsel in *Cartt v. Superior Court*, supra, is that:

> "As far as shifting the cost burden of giving notice to the defendant is concerned, probably the less we say about this problem at this time, the better.
>
> *** [T]he concept of making a defendant pay thousands of dollars so that a suit against it may proceed raises obvious constitutional problems, which should not be decided until they must be" (id. at 975.)

As the dissent in *Civil Service* stated:

"Requiring plaintiffs in class actions to pay notice costs does not place an unreasonable limitation upon meritorious causes of action. The traditional method of financing class litigation involving minor claims of many plaintiffs-like the method of financing plaintiff costs in personal injury litigation-is for counsel to advance the costs. If counsel does not have sufficient confidence in his cause to advance costs, he should not burden our courts with questionable claims of clients who have not retained him" (*Civil Service,* supra, 22 Cal. 3d at 386).

IV. *PLAINTIFFS' PROPOSED METHOD OF DISSEMINATING THE CLASS NOTICE IS INADEQUATE AND FAILS TO SATISFY THE GOVERNING LEGAL STANDARDS.*

* * *

In their class certification motion plaintiffs argued that the class is "readily identifiable" through official records, including those maintained by VWoA (Memo. of Points and Authorities in Support of Plaintiffs' Motion for Class Certification, p. 28). But plaintiffs apparently subsequently recognized the virtually impossible task of ascertaining the members of their class and their whereabouts. Indeed, the plaintiffs' decision to rely upon a mailing list of *current* vehicle owners represents an acknowledgment that the members of the certified class cannot be identified.

The Affidavit of John Von Hollen, Product Recall Coordinator for VWoA, clarifies the extent of this problem. VWoA does not maintain any records or data base from which members of the class can be identified (Affidavit of John Von Hollen, par. 3, attached hereto as Exhibit B). The only relevant source of such information possessed by VWoA is its computerized Vehicle Data File, which is indexed by Vehicle Identification Numbers (id., par. 4). The file is maintained for use in sending out recall notices.

Because such notices are sent to current rather than former owners, information on the names and addresses of prior vehicle owners is not retained in the file (id., par. 4). As soon as name and/or address change information is received by VWoA regarding the owner of a particular vehicle it is substituted in place of the existing information (id., par. 5). VWoA processes 10,000 such changes per month (ibid.).

Under the circumstances, there is no means of determining whether the individuals listed in VWoA's Vehicle Data File are class members, except in cases where the original purchaser is the current owner of the vehicle and has not moved. The class simply cannot be identified from these records. The court should consider, therefore, whether decertification or redefinition of the class is appropriate. At a minimum, the class should be redefined to limit its scope to identifiable members. If plaintiffs are unable or unwilling to undertake the process of framing a class with identifiable members, the Court should decertify this action.

Plaintiffs' proposal for publication by newspaper is equally deficient. In the first place, publication is inherently inappropriate in an action such as this where plaintiffs may be divested of their right to pursue individual damage claims, which whether meritorious or not, may be substantial. In any case, the one-day publication of a quarter-page ad in newspapers in five California cities (Pls. Memo at 9) suggested by plaintiffs fulfills neither the guiding statutory requirements nor the purpose of notice.

As a general rule, individual notice is required to class members because "it is essential for them to decide whether to remain as members of the class and become bound by the rule of res judicata; whether to intervene with their own counsel; whether to "opt out" and pursue their independent remedies" (*Cooper v. American Savings &*

Loan Association (1976) 55 Cal.App.3d 274, 285). Potential plaintiffs "are entitled to the *best practical notice under the circumstances* ***" (*Kass v. Young,* supra, 67 Cal. App. 3d at 106 (emphasis added)). Notice by publication is permissible only where the "membership class is huge, the damages are minimal and res judicata and other problems *** are insignificant" (*Cooper v. American Savings & Loan Ass'n,* supra, 55 Cal.App.3d at 285).

Here the damages claimed by the class members are not minimal. Plaintiffs have claimed damages for oil consumption alone totaling $18,750,000 (Pls. Memo. at 18). They estimate additional consequential damages of at least $7,500,000 (id. at 20). If there are 200,000 class members (Pls.Memo. at 3) their claims average $130. This is not an insignificant sum and individual class members can be expected to assert claims in excess of $130 (e.g., Joan Nosse $1,200).

The rationale of the decisions sanctioning the use of notice by publication is that where questions concerning the res judicata effect of the class action on the parties are minimal, due to the unlikelihood of renewed litigation, individual notice should not be required because the financial burden of providing such notice outweighs its potential benefits (*Cartt v. Superior Court,* supra, 50 Cal. App. 3d at 969, 972-973; *Cooper v. American Sav. & Loan Ass'n,* supra, 55 Cal. App. 3d at 284-285). Conversely, where there is a real prospect of multiple litigation over the class action claims, individual notice is "essential" to protect the interests of absent class members and the Court (see *Cooper v. American Sav. & Loan Ass'n,* supra, 55 Cal.App.3d at 285-286). In every case, the court's objective in determining the appropriate type of notice to be given is to insure that practical res judicata will be achieved between the parties through the class action. The court must attempt to "settle the dispute between the class and the defendant for all practical, as distinguished from theoretical purposes [to insure] that the entire class' complaint is adjudicated de

facto, if not de jure" (*Cartt v. Superior Court*, supra, 50 Cal.App.3d at 968).

There are several actions currently pending against VWoA in which class members are raising claims encompassed within plaintiffs' complaint. (Further Response of VWoA to Plaintiffs' First And Second Set of Interrogatories, Response to Interrogatory No. 54 and Exh. A hereto). Some of these actions were filed after the initiation of the instant case. Obviously there exists sufficient incentive for class members to initiate individual actions. There is both a present reality of multiple litigation and a concrete prospect of future litigation over the class action claims. Under the circumstances, individual notice should be required.

* * *

V. *THE CONTENT OF PLAINTIFFS' PROPOSED NOTICE IS INADEQUATE.*

* * *

The proposed notice also fails to state that the Court has made no determination on the merits of plaintiffs' claims. The strict appearance of judicial impartiality in the notice is essential (*Newberg*, supra, §2475(e), pp. 150-151). Yet plaintiffs' proposed notice contains the statement that the

> "*** notice has been approved as to form and content by order of the Superior Court of the State of California, in and for the City and County of San Francisco."

This statement of judicial approval in a document bearing the Court's signature may suggest, to the unsophisticated layman, that the Court views the plaintiffs' position favorably. The statement serves no purpose in the notice. It should be eliminated.

The Court should state that the class action certification order does not constitute a determination of the merits of plaintiffs' claims. It is only a preliminary procedural determination as to the potential parties involved. The Court should also state that the notice is not to be understood as an expression of any opinion by the Court as to the merits of any claims or defenses asserted by either side. The inclusion of these statements will preserve the appearance of judicial impartiality.

* * *

FOOTNOTES

1. The requirement of notice also insures that the defendant will be fairly treated:

> "[T]he vice of the procedure followed by the trial court is that it allows so-called 'one-way intervention,' a procedure under which potential members of the class can reserve their decision to become part of the class until the validity of the cause is asserted by the main plaintiffs on behalf of the class has been determined. While one-way intervention has obvious attraction for members of the class on whose behalf an action has been brought in that it creates for them a no-lose situation, for defendant it holds the terrors of an open-ended lawsuit that cannot be defeated, cannot be settled, and cannot be adjudicated. To him it presents a classic no-win option" (id., p. 1011).

2. Plaintiffs' statement that this Court's Class Action Manual "indicates that notice *** of the pendency of all class actions is not required" is somewhat misleading (Pls. Memo., p. 7). The Manual provides that as a "general rule" notice "shall be ordered" (Class Action Manual, §427.6). However, "an order may be made, on *motion* of a party,

dispensing with the *requirement* that the class be notified of the action" (ibid.) (emphasis added). By its express terms, section 427.6 of the Manual makes class notice mandatory unless a party, upon a properly noticed motion, persuades the Court that the notice requirement should be waived in a particular case. In view of the constitutional considerations involved, a party would have an extremely heavy burden to meet in order to obtain a waiver of the notice requirement (see *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 315; *Hansberry v. Lee* (1940) 311 U.S. 32).

AFFIDAVIT OF JOHN VON HOLLEN

In the Superior Court of the State of California
In and for the City and County of San Francisco

JOAN NOSSE, JERRY KANE, et al.,

Plaintiffs,

-against-

VOLKSWAGEN OF AMERICA, INC., et al.,

Defendant.

STATE OF NEW JERSEY)
:ss.:
COUNTY OF BERGEN)

JOHN VON HOLLEN, being duly sworn, deposes and says:

1. I am Product Recall Coordinator, for defendant Volkswagen of America, Inc. ("VWoA"). I make this affidavit, based on personal knowledge, in support of VWoA's submission in response to plaintiffs proposals concerning notification to the class.

2. I am informed that the Court has defined the class to be notified as all persons residing in California who, at any time between May 7, 1976 and May 1, 1979, owned a 1974-1980 Volkswagen manufactured Rabbit, Dasher, Scirocco or Audi equipped with valve stem seal No. 056-109-675, who have registered such vehicle with the California Department of Motor Vehicles.

3. I know of no listing or data base maintained by VWoA or any other entity, from which the identities of all, or even a substantial portion of such persons can be identified and located. Conversely, every data base known to me which might include some persons within the class includes numerous persons who are not within the class. The facts upon which I base these statements are as follows:

4. VWoA maintains no records of original retail purchasers as such. Our computerized Vehicle Data File is indexed by Vehicle Identification Numbers (VIN) which can be sorted by model and year. That listing, however, only identifies the most recent registered owners of each vehicle known to VWoA, as this file exists, not for historical purposes but as a source of current data for use in recall or service actions.

5. When VWoA receives notification of name and address changes, the former data is automatically deleted from the file. Such name and/or address changes are presently being processed by VWoA and entered in the file at the rate of 10,000 per month. No distinction is made between mere address changes and changes of ownership. Accordingly, the number of original vehicle owners who can be identified as such through the Vehicle Data file decreases over time.

6. A particular vehicle file will show whether any changes of name and/or address have been entered as to that vehicle. However, the file will not show how many such changes have occurred, nor will it reflect their nature.

7. The Vehicle Data file identifies the selling dealers of particular vehicles and also shows the existence and location of the most recent used car transaction involving the vehicle which takes place through a VW or Audi dealer. The names of the parties to such transactions, however, can only be ascertained from a hand search of the records of the dealers involved, assuming that such records are retained by the dealers.

8. Accordingly, the only class members who can be positively identified from VWoA's Vehicle Data File are current California owners as to whom there has been no name or address change since May 7, 1979.

9. Based upon California's market share for VW's and Audi's and the extraordinarily high mobility of the state population, I believe it a fair estimate that 20% of the name and address changes received by VWoA relate to California. On this basis, I would estimate that between 90,000 and 100,000 such changes have been entered in VWoA's files as to California vehicles since the close of the class period. Since there are only approximately 150,000 vehicles in the class, a significant portion of current California owners of class vehicles are most likely not members of the class.

10. I have spoken with representatives of the Polk organization, which maintains and sells mailing lists of vehicle owners, and the California Department of Motor Vehicles. The only records available from these entities merely list current vehicle owners and are thus far less comprehensive even than VWoA's records discussed above. Such lists are not available

for periods earlier than 1980, again after the class period ended.

s/John Von Hollen
JOHN VON HOLLEN

Sworn to
April 20th, 1983

s/David Taylor
Notary Public

APPENDIX "L"

MEMORANDUM

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

JOAN NOSSE, JERRY KANE, et al.,

Plaintiffs,

vs.

VOLKSAGEN OF AMERICA, INC., et al.,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER REGARDING NOTICE TO CLASS AND ALLOCATION OF COST OF NOTICE

* * *

II

INDIVIDUAL FIRST CLASS MAIL NOTICE AND PUBLICATION IN MAJOR NEWSPAPERS WILL SERVE THE INTEREST OF VWoA

There are, of course, several salutary purposes served by an action proceeding on a class-wide basis.

One such benefit is to the plaintiff class. For instance, in this suit plaintiffs represent approximately 200,000 persons who fit the description of the class as certified by this Court.[8] The claims of each of those 200,000 people will rarely exceed $1,000.[9] Individual actions by each of the consumers plaintiffs represent would be impractical because the amount of individual recovery would not justify the bringing of a lawsuit; hence, without the use of the class action mechanism the plaintiff class, in this action, would go without redress and the defendant would keep the fruits of its fraud, breaches of contract and/or statutory duties. *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 808, 94 Cal. Rptr. 796; *Fletcher v. Security Pacific Bank* (1974) 23 Cal. 3d 442, 53 Cal. Rptr. 28.

Another benefit of the class action suit is to the courts and the defendant. Once a binding class judgment is entered other plaintiffs with similar grievances will not be able to burden the already congested courts with similar claims nor will such persons be able to succeed in suing the defendant on the same claims as those determined in the class action. *Cartt v. Superior Court* (1975) 50 Cal. App. 3d 960, 124 Cal. Rptr. 376.

In its order certifying this case as a class action, this Court resolved in favor of plaintiffs the issue of

whether the named plaintiffs and their counsel could properly represent the unnamed class members described in this Court's Certification Order. Thus, the primary purpose of the notice to the members of the class, at this stage of the proceedings, is to assure defendant that any judgment in its favor will be *res judicata* on all class members. *Cartt v Superior Court, supra,* 50 Cal App. 3d at 968-969; *Cooper v. American Savings and Loan Association* (1976) 55 Cal. App. 3d 274; 127 Cal. Rptr. 570. As the court succinctly stated in *Home Savings and Loan Association v. Superior Court* (1974) 42 Cal. App. 3d 1006, 1007, 117 Cal. Rptr. 485:

> The critical reason for notification of members of the class on whose behalf a class action has been brought is that notification makes possible a binding adjudication and an enforceable judgment with respect to the rights of the members of the class. Absent such notification no member of the class need be bound by the result of the litigation. Defendant, however, could find itself in an entirely different position. Under the doctrine of collateral estoppel a defendant who litigates and loses issues tendered in a class action filed by an individual member of the class may be estopped in subsequent litigation with other members of the class to deny the validity and binding effect of the judgment against him in the first action. Contrariwise, if defendant prevails in the first cause of action involving merely individual members of the class, no other members of the class need be bound by the outcome, for they were not parties to the lawsuit and received no notification about it.

It is clear that, unlike the federal forum and Federal Rule of Civil Procedure 23, California law does not require individual notice to members of the class. *Archibald v. Cinerama Hotels* (1976) 15 Cal. 3d 853,

861, 126 Cal. Rptr. 811; *Cartt v. Superior Court, supra,* 50 Cal. App. 3d at 975. Indeed, the San Francisco Superior Court Manual for the Conduct of Pretrial Proceedings in Class Actions (1977, August; hereinafter referred to as "the Manual") indicates that notice, let alone individual notice, of the pendency of all class actions is not required (Manual, §427.6).

Nonetheless, it is also clear that defendant VWoA may well wish that each and every class member receive notice and choose not to "opt out" so that a judgment favorable to it, after what is already an extensive litigation process, will be binding on all future plaintiffs with similar claims. *Home Savings and Loan Association v. Superior Court, supra,* 42 Cal. App. 3d at 1011.

The named plaintiffs, already having been found to be adequate representatives of the class, can and will proceed with the prosecution of this case with the interests of the absent class members as their primary concern. The same plaintiffs feel no particular need to notify the absent class members at this point in the proceeding. If no notification were given and plaintiffs win, then the absentees can take advantage of the judgment; if no notification were given and plaintiffs lose, then the absentees are not bound. *Notification only helps the defendant.*

Just so the plaintiffs' position is not misconstrued, plaintiffs upon settlement and/or a favorable judgment would strenuously urge that each and every member of the plaintiff class be notified in the best possible manner so that plaintiffs' hard fight for results would truly inure to the largest number of class members. But now, at this stage of the litiga-

tion, it is primarily defendant that benefits from notice to class members because of the potential *res judicata* effect of notification and non-exclusion (not opting out).

The defendant who, as alleged herein, victimizes hundreds of thousands of people is not entitled to only one lawsuit. On the other hand, the integrity of the class action process demands that the court assure itself that renewed litigation is only a remote possibility. In addressing this very problem, the court in *Cartt v. Superior Court, supra,* 50 Cal. App. 3d at 968-969, held publication notice may be sufficient rather than individual notice (Justice Kaus, now of the California Supreme Court, wrote the opinion):

> It simply does not follow, however, that a state may not permit a class action to go forward unless the defendant can be assured in advance that in the event of a defense victory all members of the class will be foreclosed from further proceedings. A defendant who in one way or another victimizes hundreds of thousands has, after all, no constitutional rights to be subjected to only one lawsuit. This is not to say that the integrity of class action process does not demand that it settle the dispute between the class and the defendant for all practical, as distinguished from theoretical, purposes: that the entire class' complaint is adjudicated *de facto,* if not *de jure* . . . .
>
> The best that the class action court can do is to give itself reasonable assurance that under all of the circumstances that may prevail in the future—the improbability that anyone else who is only minimally damaged will undertake and underwrite new litigation, the statute of limitations, the doctrine of *res judicata* and, above all, the impact of *stare decisis*—renewed harassment is nothing but a remote

theoretical possibility. (Emphasis in original) (footnotes omitted).

The Manual §427.6(b)(11) requires that a statement discussing the manner of notice be set forth in this motion. Likewise, the Consumer Legal Remedies Act, Civil Code §§1750, *et seq.*, (applicable here, see *infra*, parts III and IV), suggests at §§1781(c) and (d) a similar statement by the parties.

Plaintiffs believe that individual notice and publication in major newspapers throughout the state will best give defendant VWoA the protection it may require. Plaintiffs have determined that mailed individual notices (including obtaining the list of class members, typesetting, printing letters and envelopes, folding letters, labelling, delivery to post office, postage and sales tax) for approximately 200,000 class members will cost an estimated $51,243.08. (Footnote omitted). Publication of ¼ page ads in the main section of major newspapers for one day costs (footnote omitted):

Newspaper	*Circulation*	*Cost*
San Jose Mercury	230,000	$1,498.98
Oakland Tribune	185,000	890.48
S.F. Chronicle & Examiner	660,000	4,770.00
Los Angeles Times	1,081,050	5,760.00
Los Angeles Herald Examiner	307,000	1,876.00
San Diego Union Tribune	345,000	2,028.00

The method here suggested and recommended by plaintiffs will give defendant reasonable assurance of a binding judgment upon all persons with similar grievances who do not opt out. Defendant, of course,

may suggest and recommend other or different notice mechanisms more suited to its desires. As Justice Kaus stated in *Cartt v. Superior Court, supra,* 50 Cal. App. 3d at 974:

> This, of course, would not prevent Standard from stuffing at its own expense if it desires to do so. If Standard is sincerely troubled about the *res judicata* effect of this litigation, it should be permitted to buy as much protection against future claimants as it thinks it needs. (Footnotes omitted).

III.

DEFENDANT SHOULD BE ORDERED TO PAY FOR THE COST OF NOTIFICATION TO CLASS MEMBERS

The California Supreme Court has affirmed the Superior Court of the City and County of San Francisco's order directing the defendant, in a class action suit, to initially bear the expense of the cost of notice. *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal. 3d 362, 149 Cal. Rptr. 360 (hereinafter *"Civil Service"*).

The Supreme Court in *Civil Service* contrasted California's procedure with that of the federal courts, and held at 22 Cal. 3d 376:

> In California, in contrast to the federal realm, the Legislature has specifically authorized trial courts in class actions to impose the cost of notice upon either the plaintiff or the defendant. Civil Code section 1781, subdivision (d), a provision of the Consumer Legal Remedies Act enacted in 1970 to facilitate consumer class actions, explicitly provides that "[i]f the action is permitted as a class action, the court may direct *either* party to notify each member of the class of the action." (Emphasis added.)

Although section 1781, subdivision (d), does not directly apply to the present case because insurance is technically neither a "good" nor a "service" within the meaning of the Act [Civ. Code §1761, subds. (a) and (b)], we expressly held in *Vasquez v. Superior Court, supra,* 4 Cal. 3d 800, 820, that the class action procedures prescribed by the Consumer Legal Remedies Act could and should appropriately be utilized by trial courts in all class actions. Numerous decisions since *Vasquez* have confirmed the applicability of the Act's procedures in class actions which do not strictly fall within the aegis of the act. (See, *e.g., Anthony v. General Motors Corp.* (1973) 33 Cal. App. 3d 640, fn. 1, 651, 109 Cal. Rptr. 240). Moreover, in enumerating the various provisions of the Consumer Legal Remedies Act by which trial courts should be guided, we specifically identified in *Vasquez,* section 1781, subdivision (d) and its authorization of the imposition of notice costs on either party in a class action. (4 Cal. 3d at p. 820). Thus, under *Vasquez,* California trial courts clearly possess general authority to impose notice costs on either party, plaintiff or defendant, in a class action. (Footnotes omitted).

The *Civil Service* Court reiterated what it said in *Vasquez,* section 1781, subdivision (d), and its authorization of the imposition of notice costs on ty. The Court then stated at 22 Cal. 3d 377-378:

A class action procedure authorizing a trial court to impose notice costs upon a defendant in a particular case serves the same general public policies. In the absence of such a cost-shifting procedure, the class action mechanism might frequently be completely frustrated since the representative plaintiff, whose individual claim will ordinarily be relatively small, may often be unable to afford the initial cost of notifying all absent members of the pendency of the action. (See

> Note, *Managing the Large Class Action; Eisen v. Carlisle & Jacquelin* (1973) 87 Harv. L. Rev. 427, 441-442; Comment, *Cost Allocation in California Class Actions* (1976) 13 Cal. Western L. Rev. 65, 83.) Under such circumstances, a defendant who may have improperly inflicted a small financial loss upon a great number of people could succeed in defeating a class action suit without regard to the strength of the plaintiffs' claim.

Indeed, §1760 of the Consumer Legal Remedies Act codifies the legislative intent and philosophy toward consumer class actions. Civil Code section 1760 states:

> This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

In *Cartt v. Superior Court, supra,* 50 Cal. App. 3d 960, 970, Justice Kaus recognized that "the notice ordered must be consistent with the broad California concept of consumer class actions," as stated in *Vasquez v. Superior Court, supra,* 4 Cal. 3d 800, 808. After pointing out the extremely favorable treatment the Supreme Court has given to consumer class actions, the *Cartt* court stated at 50 Cal. App. 3d 971, 972:

> More specifically, our cases have indicated that class actions should be permitted to proceed, where the economic realities involved in giving "adequate" notice, compared to the small individual losses of class members, would effectively negate any class action. Thus, in *Daar v. Yellow Cab Co., supra,* 67 Cal. 2d 695, which involved an unknown number of Los Angeles taxi cab users, the court, in distinguishing between an

"ascertainable class and the necessity of identifying the individual members of such class" noted that a "finding of a community of interest at this time *may provoke later questions as to the res judicata effect of any judgment herein.* However, as Witkin says '[A] distinction is sometimes drawn between the maintenance of suit and its binding effect on the absent parties. A sufficient pleading of the conditions may withstand a demurrer and satisfy the court that the action should proceed. *But if the judgment is thereafter collaterally attacked by an absent party, a more careful scrutiny of its representative character may be made in determining whether it is res judicata.*' " *(Id.,* at p. 706. Fn. and citation omitted; emphasis added).

Daar was not concerned with notice; the issue was the propriety of a class action. However, in allowing the action to go forward, *Daar* necessarily recognized that there was no economically feasible method of assuring that all class members would receive notice of the action. *Daar* would, doubtless, not have been maintained as an individual action; even the named plaintiff alleged only $100 spent in script book coupons and cash *(Id.,* at pp. 702, 703) and the claim was only for overcharges! (Emphasis in original).

The *Cartt* Court distinguished between those cases where the plaintiffs' individual claims are significant so that renewed litigation after a class judgment is an important concern and those where the plaintiffs' claims are insignificant in amount, a few hundred dollars (the average claim in the present suit), where it is unlikely and only a remote possibility that an absent class member would renew litigation; hence, individual notice would be unnecessary.

The court in *Cooper v. American Sav. & Loan Assn.* (1976) 55 Cal. App. 3d 274, 127 Cal. Rptr. 579, following *Cartt* and other California law, stated at 284-285:

> In *Chance, supra,* the amounts involved were substantial and the class action was opposed by some potential class members. The required notice was by registered mail or other like reliable method. In *City of San Jose, supra,* the plaintiffs sought damages of $500,000 for a class estimated at 733. The court noted the constitutional importance of notifying absent class members because of the desirability that any judgment be *res judicata.*
>
> In contrast to the above cases, *Daar v. Yellow Cab Co., supra,* 67 Cal. 2d 695, though not involved with a notice issue, proceeded as a class action suit although there was no feasible method of assuring that all class members would receive notice. The reason was that individual members probably would not have maintained individual actions because each member's damages were so low. Questions as to the *res judicata* effect on the parties was minimal if not nonexistent. *Cartt,* in comparing *Chance, et al.* with *Daar,* said on pages 972-973: "The distinction with respect to the concern for the *res judicata* effect of the action in *Chance* and in *Daar* is notable . . . Unlike in *Daar,* the class members in *Chance* were much less likely to abandon their claims, and, absent personal notice to assure that the matter would be *res judicata* as to the remaining class members, any advantages in the class action mechanism would be negated by the likelihood that the issue would surface again." *Cartt* then concluded: "This case is obviously way over on the *Daar* side of the spectrum. Therefore, it is entirely appropriate—as the Supreme Court suggests—to distinguish 'between the maintenance of the suit and its binding effect on the absent parties.' (67 Cal. 2d at p. 706). The class is

> huge, the damages per member trifling and the financial burden of the notice ordered by the respondent court entirely out of proportion to its beneficial results when these are compared to the purely theoretical risks of a less expensive method of notifying the class."

In this consumer class action suit plaintiffs' class of 200,000 is large and plaintiffs' class members' individual claims are small . . . as to financial inability of plaintiffs to defray noticed costs (Material ordered stricken from the record). The very reason for this class action is to vindicate small claims which would otherwise go without redress. Such claimants, by definition, would not themselves due for redres but rely on the class action mechanism. Hence, this Court should not be concerned with multiple litigation. If the defendant is concerned with the *res judicata* effect on this litigation, then defendant should pay for the cost of such assurance.

The Supreme Court in *Civil Service, supra,* 22 Cal. 3d at 380, indicated that the trial court at the notice hearing is to consider factors mentioned in *Cartt,* which case in turn considered the factors mentioned in *Berland v. March* (S.D.N.Y. 1969) 48 F.R.D. 121, 131-132, and *Lamb v. United Security Life Company* (S.D. Iowa 1972) 59 F.R.D. 25, 38-43, in determining who should bear the initial cost of notification.

The *Cartt* court's main consideration was the likelihood of renewed litigation. In this case it is clear that renewed litigation is not a concern; it doesn't even approach a remote possibility.

Cartt also mentioned that the Federal Trade Commission (hereinafter "FTC") had issued, after in-

vestigation, a cease and desist order and that the trial court resolved several issues in favor of the plaintiff, including that (1) the class was ascertainable; (2) there were questions of law and fact common to the class members; (3) the class action was superior to other available alternatives; and (4) the plaintiff was an adequate representative for the class.

In this case, the FTC has issued a complaint against VWoA based upon allegations similar to those alleged by plaintiffs herein, wherein the Commission has determined, after investigation, that the FTC has "reason to believe" that VWoA has violated the Federal Trade Commission Act, 15 U.S.C. §45. Such a complaint must be based upon a threshold determination that proceedings should be initiated requiring VWoA to respond and litigate the issues therein involved. *F.T.C. v. Standard Oil of California* (1980) 101 S. Ct. 488. Further, VWoA attempted to have certain charges dismissed by filing a motion for summary judgment in docket number 9154, before the FTC. This Court is hereby requested to take judicial notice of the FTC complaint against VWoA and the denial of VWoA's motion for summary judgment, pursuant to the Cal. Evid. Code §450, *et seq.;* a copy of information sufficient to substantiate plaintiffs' request (the FTC complaint and the Order Denying VWoA's Motion for Summary Judgment) is attached as group Exhibit D to this motion and incorporated herein by reference.

Further, and perhaps more importantly, the Environmental Protection Agency (hereinafter "EPA") has in October 1980, issued a Notice of Non-Conformity Finding and Order re Remedial Plan indicating that a substantial number of VWoA Vehicles (same makes and models involved in this class action

lawsuit) were, because of excessive oil burning due to valve stem seal defects, polluting in excess of federal standards. See, 42 U.S.C. 7541(d), which is also known as §207(c) of the Clean Air Act, 40 C.F.R. 85.1802. This Court is hereby requested to take judicial notice of the E.P.A. Notice and Order re Remedial Plan pursuant to Cal. Evid. Code §450, *et seq.;* a copy of information sufficient to substantiate this request is attached as Exhibit E to this motion and incorporated herein by reference.

Most illuminating in terms of the merits of plaintiffs' cause is the fact that defendant VWoA has terminated EPA involvement (in light of recent events, that appears to be easy to do) by instituting an extremely limited recall of only 1977-1979 gasoline engine Rabbits and Sciroccos, merely offering to replace the defective valve stem seals and, in some cases, to reimburse the owners no more than $125.00 if defective seals had already been replaced at the owner's expense (footnote omitted).

It should be emphasiz;ed, however, that VWoA's limited recall does not provide for reimbursement for loss of oil, damage caused by oil leakage, or repairs made in vain efforts to halt oil seepage. Further, no provision is made for reimbursement to those owners who replaced defective valve stem seals with other defective valve stem seals. Nor does the limited recall account for all vehicles equipped with defective valve stem seals: 1974, 1975, 1976 and 1980 Rabbit, Scirocco, Audi and Dasher vehicles, 1977, 1978 and 1979 Dasher and Audi vehicles, and 1974-1980 diesel engine vehicles are all omitted.

A further indication of the merits of plaintiffs' class claims is the fact that ever since new and different valve stem seals were used in April 1979 production, replacement figures indicate that the problem, excessive oil consumption and related loss, has ceased to exist (footnote omitted).

Defendant has virtually admitted liability by implementing a limited national recall and changing the composition of the offending valve stem seals. The EPA and the FTC both issued notices, complaints and orders concerning the subject of this lawsuit. The public policy and philosophy indicated by the California Supreme Court and the Consumer Legal Remedies Act will best be served by shifting the initial cost of notice to the defendant. As the Supreme Court in *Civil Service* stated at 22 Cal. 3d 377:

> . . . in the absence of such a cost shifting procedure, the class action mechanism might frequently be completely frustrated since the representative plaintiff, whose individual claim will ordinarily be relatively small, may often be unable to afford the initial cost of notifying absent members of the pendency of the action.

Therefore, without costs allocated initially to the defendant, plaintiffs herein, and in general, would be foreclosed from obtaining any meaningful remedy.

> When an action cannot proceed unless costs are allocated, where merits are unquestionably strong, and where vindication would be effectively foreclosed absent the class action procedure, strong public policy considerations clamor for justice. (Comment, *Cost Allocation in California Class Actions, supra,* 13 Cal. Western L. Rev. 65, 85).

* * *

APPENDIX "M"
STATE CLASS ACTION PROVISIONS

Alabama:	Ala. Code, R. Civ. P. 23 (c)(2)
Alaska:	Alaska Rules of Court, Civil Rule 23(c)(2)
Arizona:	Ariz. Rev. Stat. Ann., R. Civ. P. 23(c)(2)
Arkansas:	Ark. Stat. Ann., R. Civ. P. 23(d)
California:	Cal. Civil Code §1781(d) (West)
Colorado:	Colo. Rev. Stat., R. Civ. P. 23 (c)(2)
Connecticut:	Conn. Gen. Stat. Ann. §42-110 h(d) (West)
Delaware:	Del. Code Ann., Chancery Ct. R. 23(c)(2)
District of Columbia:	D.C. Court Rules Ann., Rule 23(c)(2)
Florida:	Fla. Stat. Ann., R. Civ. P. 1.220(d)(2) (West Supp. 1983)
Georgia:	Ga. Code Ann. 9-11-23
Guam:	Guam Code Civ. Pro., App. A Rule 23(c)(2)
Hawaii:	Hawaii R. Civ. P. 23(c)(2)
Idaho:	Idaho Code, Court Rules 23(c)(2)
Illinois:	Ill. Ann. Stat., ch. 110 §2-803 (Smith-Hurd)
Indiana:	Ind. Code Ann., Court Rules T.R. 23(c)(2) (Burns)
Iowa:	Iowa R. Civ. P. Ann., Rule 42.7 (West Supp. 1983)
Kansas:	Kan. Stat. Ann., R. Civ. P. §60-223(c)(2)
Kentucky:	Ky. Rev. Stat. Ann., R. Civ. P. C.R. 23.03(2) (Baldwin)
Louisiana:	La. Code Civ. Pro. Ann. Art. 594 (West)
Maine:	Me. Rev. Stat. Ann., R. Civ. P. 23(c)(2)
Maryland:	Md. Ann. Code, R. Civ. P. 209(c)
Massachusetts:	Mass. Ann. Laws, Civ. R. 23 (Michie/Law. Co-op)
Michigan:	Mich. Ct. R. Ann. 208
Minnesota:	Minn. Stat. Ann., R. Civ. P. 23.03(2) (West)

Missouri:	Mo. Ann. Stat., R. Civ. P. 52.08(c)(2) (Vernon)
Montana:	Mont. Rev. Codes Ann., R. Civ. P. 23(c)(2)
Nebraska:	Neb. Rev. Stat. §25-319
Nevada:	Nev. Rev. Stat., R. Civ. P. 23(c)(2)
New Jersey:	Rules Governing the Courts of the State of New Jersey, Civ. P.R. 4:32-2(b)
New Mexico:	N.M. Stat. Ann., R. Civ. P. 23(c)(2)
New York:	N.Y. C.P.L.R. §904(b)(McKinney)
N. Carolina:	N.C. Gen. Stat. §1A-1, Rule 23
N. Dakota:	N.D. Cent. Code, R. Civ. P. 23(g) (Smith Supp. 1981)
Ohio:	Ohio Rev. Code Ann., R. Civ. P. 23(c)(2) (Page)
Oklahoma:	Okla. Court Rules and Procedure, 12 §15
Oregon:	Or. Rev. Stat, R. Civ. P. 32
Pennsylvania:	42 Pa. Cons. Stat. Ann., R. Civ. P. 1712 (Purdon)
Puerto Rico:	P.R. Laws Ann., T. 23 App. II, R. Civ. P. 20.1
Rhode Island:	R.I. Gen. Laws, R. Civ. P. 23(d)
S. Carolina:	S.C. Code §15-5-50
S. Dakota:	S.D. Comp. Laws Ann. R. Civ. P. 23(c)(2)
Tennessee:	Tenn. Code Ann., R. Civ. P. 23(c)(2)
Texas:	Tex. R. Civ. P. 42(c)(2) (Vernon)
Utah:	Utah Code Ann., R. Civ. P. 23(c)(2)
Vermont:	Vt. Stat. Ann., R. Civ.P. 23(c)(2)
Virgin Is.:	V.I. Code Ann., T.5 App. I Civil R. 23(c)(2)
Washington:	Wash. Ct. R. Ann., C.R.23(c)(2)
W. Virginia:	W. Va. Code Ann., R. Civ. P. 23
Wisconsin:	Wis. Stat. Ann. §803.08 (West)
Wyoming:	Wyo. Ct. R. Ann., R. Civ. P. 23(c)(2)